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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 268.

MISSOURI-KANSAS PIPE LINE COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, GEORGE H. HOWARD, PHILIP G. GOSSLER, CHARLES A. MUNROE, THOMAS R. WEYMOUTH, THOMAS B. GREGORY, EDWARD REYNOLDS, JR., BURT R. BAY and JOHN H. HILLMAN, JR.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF OF APPELLEE, COLUMBIA OIL & GASOLINE CORPORATION.

DANIEL O. HASTINGS,
Continental American Building,
Wilmington, Delaware.

WILLIAM H. BUTTON,
27 Cedar Street,
New York, N. Y.

JAMES B. ALLEY,
50 Broadway,
New York, N. Y.

Of Counsel:
WILLIAM H. BUTTON,
JAMES B. ALLEY.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF OF APPELLEE, COLUMBIA OIL & GASOLINE CORPORATION.

Decisions of the Lower Courts.

This brief is submitted in opposition to the appeal of the appellant, Missouri-Kansas Pipe Line Company, from an order of the District Court of the United States for the District of Delaware, dated April 23, 1940 (R.* 541-542), denying without opinion the application of the appellant

* The Transcript of Record on this appeal will be referred to as "R."

(R. 526-540) for leave to file its application as a derivative stockholder's application on behalf of Panhandle Eastern Pipe Line Company to intervene in an Anti-Trust suit pending in the District Court. That application was the fourth of a series of applications made by the appellant, or by its attorneys purporting to act on behalf of Panhandle Eastern Pipe Line Company, for leave to intervene in that suit. All of these applications have been denied.

The first application was made on February 6, 1939 (R. 283-284), and was denied on March 30, 1939 (R. 321-322), upon an opinion rendered by the court on March 29, 1939 (R. 314-321), which is reported in 27 Fed. Supp. 116. For the convenience of this Court, this opinion is printed at the end of this brief as Appendix A.

The second application for leave to intervene was made on July 5, 1939 (R. 362-363). This application was denied without opinion by the District Court by order dated July 10, 1939 (R. 371). Appeals were taken by the appellant from this order and from the order of March 30, 1939, denying appellant's first intervention application, to the United States Circuit Court of Appeals for the Third Circuit (R. 6). These two appeals, which were consolidated, were dismissed by the Circuit Court on December 15, 1939, the Circuit Court handing down an opinion, which is reported in 108 Fed. (2d) 614. For the convenience of this Court, this opinion is printed at the end of this brief as Appendix B. A petition by appellant to this Court for a writ of certiorari was denied by this Court on April 22, 1940 (309 U. S. 687).

The third intervention application was made on March 23, 1940, in the name of Panhandle Eastern Pipe Line Company (R. 412-424). Upon motions made by the appellees, Columbia Gas & Electric Corporation and Columbia

Oil & Gasoline Corporation for dismissal of that application (R. 426, 514-515), the District Court granted said motions and dismissed the appellant's application (R. 565). That order was entered on April 23, 1940 upon an opinion of the court dated April 6, 1940 (R. 520-526), which held, among other things, that the application had not been authorized by Panhandle Eastern Pipe Line Company. That opinion is reported in 32 Fed. Supp. 474 and, for the convenience of this Court is printed at the end of this brief as Appendix C. Appellant's appeal to this Court from that order is now pending in this Court as case No. 269 and is scheduled for argument at the same time as appellant's appeal No. 268, which is the subject of this brief.

For the sake of brevity, the appellant will sometimes be referred to as "Mokan", the appellee Columbia Gas & Electric Corporation as "Columbia Gas", the appellee Columbia Oil & Gasoline Corporation as "Columbia Oil", Panhandle Eastern Pipe Line Company as "Panhandle Eastern", and Michigan Gas Transmission Corporation as "Michigan Gas".

Questions Involved.

There are two questions involved on this appeal:

FIRST: Has this Court the jurisdiction to consider this appeal?

SECOND: If this Court has jurisdiction to consider this appeal, was the District Court right in denying Mokan's application for leave to file its application as a derivative stockholder's application on behalf of Panhandle Eastern to intervene in the Anti-Trust suit pending in the District Court?

Statement of the Case.*

The Anti-Trust suit was commenced by the United States Government on March 6, 1935, by a bill in equity filed in the United States District Court for the District of Delaware against Columbia Gas, Columbia Oil and the several individual defendants (R. 1). This bill was superseded by the Government's amended and supplemental petition filed October 30, 1935 (R. 10-30), which alleged that the defendants had been and were engaged in a combination and conspiracy in restraint of trade in Interstate Commerce in violation of the Federal Anti-Trust Laws and that pursuant to such combination and conspiracy they had performed numerous acts and deeds which had the effect of preventing Panhandle Eastern from freely and independently engaging in commerce in natural gas in several states; and the Government prayed that the defendants be restrained from exercising any dominion or control over Panhandle Eastern. Columbia Oil (R. 119-128), Columbia Gas (R. 109-119), and the individual defendants (R. 109-119, 119-128, 128-132, 132-138) filed answers denying the material allegations of the amended and supplemental petition.

The case was never tried because on January 29, 1936, a Consent Decree (R. 142-149) was entered upon a stipulation signed by all the parties (R. 138-142), finally adjusting and settling all of the matters in controversy. The stipulation contains the following statement (R. 139):

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* This brief was completed prior to examination of the brief of appellee Columbia Gas on this appeal. On examination of the Statement of the Case in Columbia Gas' brief, we find no difference of substance, and suggest that this Court dispense with the reading of the above Statement if it has already examined the Statement in Columbia Gas' brief. However, we have not eliminated the Statement in this brief for the reason that it may serve the convenience of this Court to have such a statement included herein.

> "The defendants maintain the truth of their answers in this cause and assert that they have not violated the Anti-trust laws in fact or intent, but that they desire to avoid the expense and disturbance necessarily involved in continuing this litigation, and are willing that a consent decree in the form attached hereto and made a part hereof be entered herein, without conceding or admitting the truth of the facts or matters alleged by the petitioner and without any findings of fact, provided that such consent on their part and the entry of said decree shall not constitute or be considered an admission and that the entry of such decree or the decree itself shall not be considered an adjudication that they have violated any law of the United States."

By the Consent Decree the defendants were restrained from exercising any dominion or control over, or in any way interfering with the free and independent action of, Panhandle Eastern (R. 144). Columbia Gas was expressly permitted to own stock in Columbia Oil (R. 145), subject to the requirement contained in the stipulation that such stock would not entitle Columbia Gas to elect more than a minority of the Board of Directors of Columbia Oil (R. 140). The Consent Decree further restrained Columbia Gas from acquiring any stock interest in Panhandle Eastern but expressly permitted Columbia Oil to retain its stockholdings, and acquire additional stockholdings, in Panhandle Eastern (R. 145), subject, however, to the requirement that all such stock be transferred to Mr. Gano Dunn as Trustee, who was vested with supervisory powers, including the power to vote such stock for the election of directors of Panhandle Eastern and on all other matters, and to remove and replace directors, to ensure the effectuation of the purposes of the Consent Decree (R. 146-147). From the time of his appointment up to the present time, Mr.

Dunn has acted in his appointed capacity as Trustee under the Consent Decree (R. 516). The provisions of the Consent Decree require Mr. Dunn to report to the District Court semi-annually (R. 147). His first semi-annual report for the period from January 29, 1936 to July 29, 1936, together with such exhibits thereto as are pertinent to this appeal, are part of the Record (R. 149 *et seq.*).

Pursuant to a provision of the stipulation entered into between the parties upon which the Consent Decree was entered (Stipulation, Section V, Paragraph (c); R. 141), Columbia Oil agreed to make a bona fide offer to the receivers of Mokan* for the settlement of claims asserted by the receivers against the defendants in a suit for triple damages under the Anti-Trust Laws which had been instituted by the receivers against the defendants in the United States District Court for the Southern District of New York. By agreements entered into between Columbia Oil, Columbia Gas and the receivers of Mokan as a result of negotiations for the settlement of the receivers' claims aforesaid (R. 244-245, 249-274), which were approved on April 29, 1936 by the Chancellor of the State of Delaware in the Mokan receivership proceedings (R. 245-248) and which were finally incorporated into a formal written agreement of June 1, 1936, between Columbia Oil, Columbia Gas and the receivers of Mokan (R. 219-236), Columbia Oil received 100,000 shares of Class A and 10,000 shares of Class B preferred stock of Panhandle Eastern (being all the issued and outstanding shares of these classes), and 404,326 shares of the common stock of Panhandle Eastern (being a majority of the issued and outstanding shares of

* During this period the property and assets of Mokan were being administered by receivers appointed by the Delaware Chancery Court.

its common stock). Pursuant to the provisions of the Consent Decree, these shares were immediately transferred to Mr. Dunn as Trustee (R. 150), who has since that time held and voted the same as trustee pursuant to the provisions of the Consent Decree (R. 516). Columbia Oil's beneficially owned stockholdings in Panhandle Eastern remain the same today (R. 429) and carry the right to elect six of the nine directors of Panhandle Eastern (R. 523).

On January 12, 1939, approximately three years after the entry of the Consent Decree, the Government filed in the District Court a supplemental complaint requesting that the Consent Decree be supplemented to require, in the alternative, either (1) that Columbia Gas divest itself of all its stockholdings in Columbia Oil, or (2) that Columbia Oil divest itself of all its stockholdings in Panhandle Eastern (R. 274-283). There is no allegation in this supplemental complaint that any of the defendants have violated any of the provisions of the Consent Decree. The relief requested by the Government was predicated on its interpretation of the provisions of the Consent Decree and the alleged necessity for revising the Decree in a manner to carry out its purposes as thus interpreted. Columbia Oil (R. 326-332), Columbia Gas (R. 322-326), and the individual defendants (R. 326-332, 322-326, 313-314) filed answers denying the material allegations of the supplemental complaint.

In the meantime, on February 6, 1939, Mokan had made its first application for leave to intervene in the Government's suit (this application being filed by Mokan in its own right and also in behalf of and for the benefit of Panhandle Eastern). The petition which Mokan requested leave to file set forth a series of elaborate allegations of alleged violations of the Consent Decree by the defendants and requested substantial alterations and modifications of the

Consent Decree (R. 284-312). Among other things, it asked that the Consent Decree be altered and modified to provide (a) that Columbia Gas be required to hold as Trustee for, and to transfer to, Panhandle Eastern a pipe line owned by Michigan Gas, a wholly owned subsidiary of Columbia Gas, extending from the easterly terminus of Panhandle Eastern's pipe line at the Illinois-Indiana state line to Detroit, Michigan, and that Columbia Gas be directed to account to Panhandle Eastern for the issues and profits of such pipe line, (b) that the provisions of the Consent Decree permitting Columbia Oil to own stock in Panhandle Eastern and Columbia Gas to own stock in Columbia Oil be stricken out and that Columbia Oil be forthwith directed to dispose of all its stock in Panhandle Eastern, and (c) that the Trustee appointed in the Decree be removed (R. 310). The denial of this motion and the subsequent appeals by Mokan have been previously discussed (*supra*, p. 2).

On May 15, 1939, after the defendants had filed their answers to the Government's supplemental complaint, the Government filed a motion (R. 333-334) requesting the District Court to vacate the Consent Decree of January 29, 1936, and to permit the Government to serve and file an amended and supplemental complaint, which was annexed to the motion papers. At the same time the Government moved for the entry of an order permitting the abandonment of its supplemental complaint filed January 12, 1939 (R. 332-333). The Government has not pressed these motions and the Court below has rendered no decisions thereon. Neither has the Court granted permission to serve or file the amended and supplemental complaint.

On June 20, 1939, Columbia Oil and Columbia Gas, in an endeavor to avoid the disturbance and expense attendant upon the continuance of the Government's suit and to bring about a mutually satisfactory and expeditious ad-

justment thereof, filed in the District Court on their own motion a Plan (R. 358-362) providing, among other things, for the surrender by Columbia Gas to Columbia Oil of its entire stockholdings in Columbia Oil in exchange for the transfer by Columbia Oil to Columbia Gas of all the oil and gasoline producing properties of five of Columbia Oil's subsidiary companies. Thus, the Plan in substance complied with one of the alternative prayers for relief contained in the Government's supplemental complaint filed January 12, 1939, which requested the complete divestiture by Columbia Gas of its stockholdings in Columbia Oil. The Plan was part of a motion made by Columbia Oil and Columbia Gas filed with the District Court at the same time, requesting the court to approve the Plan and to modify the Consent Decree to meet the changed conditions which would result from carrying out the plan (R. 356-358).

At this stage of the proceedings Mokan filed its second intervention application on July 5, 1939 (R. 362-363). The intervention petition (R. 363-371) which it requested leave to file did not contain such an elaborate series of allegations as was contained in its first intervention petition. It merely referred to some of the allegations and relief requested in the Government's amended and supplemental petition filed October 30, 1935 and supplemental complaint filed January 12, 1939, and then generally alleged that Columbia Gas and Columbia Oil were still controlling and dominating Panhandle Eastern in violation of the purposes of the Consent Decree and that the carrying out of the Plan proposed by Columbia Oil and Columbia Gas would not fulfill the purposes of the Decree as it would still leave Columbia Gas and Columbia Oil in control of Panhandle Eastern. The petition prayed that the Plan and the motion for its approval be disapproved and denied and that the Consent Decree of January 29, 1936, be altered and modified

by requiring Columbia Oil to divest itself of all its stockholdings in Panhandle Eastern.

In denying Mokan's second application for leave to intervene on July 10, 1939, the District Court expressly provided in its order that Mokan nevertheless might be "heard *amicus curiae* on questions of law and fact in regard to the fairness and effectiveness of the proposed plan * * * and for a modification of the decree entered in this cause, January 29, 1936, and referred to as the 'consent decree'" (R. 371). On the same date the District Court referred the consideration of the Plan and the motion for the approval thereof to a Special Master by an order (R. 371-372) which expressly provided that Mokan and certain others "shall be permitted by the Special Master to appear at the hearings before said Special Master as *amici curiae* but not as intervenors." The subsequent appeals by Mokan from the order denying its second intervention application have been previously discussed (*supra*, p. 2).

Pursuant to the order of reference above-mentioned, hearings on the Plan were held before the Special Master for several days commencing July 14, 1939 and terminating July 20, 1939 (R. 395). At the hearings the Plan was amended by Columbia Oil and Columbia Gas in certain respects not here important (R. 396-397). On July 29, 1939, the Special Master filed his Summary of Plan, Findings of Fact, Conclusions of Law and Recommendations (R. 384-394) and his Opinion (R. 373-384). On August 5, 1939 he filed his Report (R. 394-395). He recommended that the Court approve the Plan as amended at the hearings and grant the motion of Columbia Oil and Columbia Gas for appropriate modification of the Consent Decree (R. 394).

On April 23, 1940, the District Court heard arguments on the motions of Columbia Gas and Columbia Oil to confirm the Special Master's Report and on the objections and exceptions thereto filed by Mokan and others (R. 398-407). On January 18, 1941, the District Court confirmed the Special Master's Report and approved the Plan, as amended at the hearings before the Special Master, with one exception, not here important, which requires certain of the stockholders of Columbia Oil to dispose of their stock. At the hearings before the Special Master, Mokan took advantage of the privilege to appear *amicus curiae* and participated actively in the proceedings, cross examining witnesses, filing briefs, arguing in opposition to the Plan and filing objections to the Special Master's Report (R. 404-406). Mokan also argued in opposition to the Plan, both orally and by briefs, before the District Court on the motion to confirm the Special Master's Report.

On March 23, 1940, about one month prior to the date when this Court denied Mokan's petition for a writ of certiorari to review the decision of the Circuit Court of Appeals dismissing Mokan's consolidated appeals from the orders of the District Court denying the first and second intervention applications (discussed *supra*, p. 2), the third intervention application was made, this time in the name of Panhandle Eastern (R. 412-424). This application contains in substance the same elaborate allegations that were contained in the petition which Mokan sought to file on its first intervention application, except that some of the allegations in the third application have been re-phrased and condensed, but for the most part it is a word-for-word copy of the first petition. The relief requested in the third application is in substance the same as that requested in the first application, except somewhat more limited in scope in that it was made "for the limited purpose of en-

forcing the rights conferred by Section IV of the consent decree entered herein on January 29, 1936, as is provided by Section V of said Consent Decree" (R. 423). The prayers for relief were (a) that a trustee be appointed to hold all the stock of Michigan Gas for the benefit of Panhandle Eastern and that Columbia Gas be ordered to turn over such stock to such trustee; (b) that Mr. Gano Dunn be directed to surrender 80,000 shares of Columbia Oil's beneficially owned common stock in Panhandle Eastern in lieu of the receipt by Columbia Oil and Columbia Gas of some security which would confer no voting rights on Columbia Gas; and (c) that Mr. Dunn as Trustee be directed to vote the remaining common stock and the shares of Class A and Class B preferred stock beneficially owned by Columbia Oil in Panhandle Eastern so that the provisions of such preferred stock might be amended to eliminate its voting powers (R. 423-424). As previously mentioned (*supra,* pp. 2, 3), this application was dismissed by the District Court on the motions of Columbia Oil and Columbia Gas.

On April 16, 1940, about one month later, the fourth intervention application was made by Mokan as a derivative stockholder's application on behalf of Panhandle Eastern (R. 526-540). Except for the formal allegations, the allegations, as well as the prayers for relief, contained in this application are identical word-for-word with those contained in the third application. As previously mentioned (*supra,* pp. 1, 2), this application was denied by the District Court.

POINT I.

This Court should dismiss appellant's appeal on the ground that it has no jurisdiction to review the order appealed from because at the most that order involved the exercise of the discretionary powers of the District Court and is not appealable to this or any other court.

(a) The order appealed from which denied Mokan's fourth intervention application is at the most a discretionary* order of the court below.

Prior to the promulgation of the Federal Rules of Civil Procedure, intervention practice in equity was governed by Equity Rule 37, which provided that "anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." The courts in construing this rule recognized two kinds of interventions: (a) cases in which the absolute right to intervene existed, and (b) cases which were addressed to the discretion of the court. The only cases in which the absolute right to intervene existed were: (a) those in which one claimed a lien upon or an interest in specific property in the exclusive jurisdiction

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* The word "discretionary" as used throughout this brief in referring to intervention applications and orders entered thereon is not used in its strictly accurate sense. For want of a better term and for the further reason that such use conforms to its use in the decisions of the courts, the word "discretionary" as used in this brief includes, except where the context otherwise indicates, applications which the court may in the exercise of its discretion either grant or deny and also applications which, according to accepted principles of law, the court must deny in the exercise of its sound discretion. Thus, "discretionary", as that term is used in this brief, includes all intervention applications and orders entered thereon which do not fall within the class of cases in which the absolute right to intervene, or intervention as of right, exists.

and subject to the exclusive disposition of a court, and his interest therein could be established, preserved or enforced in no other way than by the determination and action of that court,* and (b) those in which the petitioner, not being fairly represented in the litigation, was asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form** (Hughes Federal Practice, Jurisdiction and Procedure, Vol. 18, §21611, pp. 90-91).

The new Rules of Civil Procedure did not change the distinctions between absolute and discretionary interventions and the characteristics of each which the courts had adopted, but, on the other hand, reduced the then existing principles of law to statutory form in new Rule 24. This rule provides for the same two kinds of intervention: subdivision (a) of this rule, entitled "Intervention of Right," embodying the previously existing principles governing the absolute right to intervene, and sub-division (b), entitled "Permissive Intervention," embodying the previously existing principles governing interventions which were addressed to the discretion of the court. Dean Charles E. Clark, Reporter to the Supreme Court Advisory Committee on the New Rules, now Judge Clark of the Circuit Court of Appeals for the Second Circuit, in discussing the new Rules (Proceedings of the Washington Institute on Fed-

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* *Credits Commutation Company* v. *United States*, 177 U. S. 311, 316.
United States v. *California Cooperative Canneries*, 279 U. S. 553, 556.
Western Union v. *U. S. & Mexican Trust Company*, 221 Fed. 545, 552 (C. C. A. 8th).
Minot v. *Martin*, 95 Fed. 734, 739 (C. C. A. 8th).

** *Whittaker* v. *Brictson Mfg. Co.*, 43 Fed. (2d) 485, 489, (C. C. A. 8th).
Palmer v. *Bankers Trust Co.*, 12 Fed. (2d) 747, 752 (C. C. A. 8th).

eral Rules, held in Washington on October 6-8, 1938, published by the American Bar Association), said with respect to Rule 24 at page 67:

> "Rule 24, Intervention, is another case where, by stating the rule more in detail, we have tried to cover the existing law without very substantial change, but more by way of clarification."

Obviously, if Mokan cannot bring itself within those cases in which the absolute right to intervene (known in new Rule 24(a) as intervention of right) is recognized to exist, then its application at the most is one which is addressed to the discretion of the court (known as permissive intervention under new Rule 24(b)). Therefore, it becomes necessary to determine if Mokan can bring itself within the principles applicable to interventions as of right under new Rule 24(a).

New Rule 24(a) states the principles underlying intervention as of right as follows:

> "INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

Clause (1) of the above Rule obviously has no application, as there is no such statute applicable to this case.

Clause (2) refers to cases where the applicant's interest is not adequately represented in the pending suit and the

judgment therein may bind the applicant. It should be noted that both elements—inadequate representation and the binding effect of the judgment—must concur. These same grounds were recognized as a basis for absolute intervention in intervention practice prior to the adoption of the new rules (*supra*, see cases under footnote ** on p. 14).

A cursory examination of the Government's supplemental complaint (R. 274-283) in the action pending in the District Court and Mokan's fourth intervention application (R. 526-540) will disclose that these two elements do not concur in this case. To the extent that Mokan seeks to intervene for the purpose of seeing that the Anti-Trust Laws of the United States are properly enforced, Mokan, like any other member of the general public, is adequately represented by the Attorney General, who is charged under the Anti-Trust Laws with the duty of enforcing them (U. S. C. A., Title 15, Sections 4 and 9). It is settled that where an agency has been appointed by statute to represent the public with respect to the matters involved and such agency is representing the public interest in a suit, a member of the general public is adequately represented in such suit and is not entitled to intervention as of right to litigate in that suit issues affected with a public interest even though partly of a private nature, in the absence of gross negligence or bad faith on the part of the statutory agency in the conduct or defense of the litigation.

In *City of New York* v. *New York Telephone Company*, 261 U. S. 312, the City of New York sought to intervene in a suit which had been instituted by the New York Telephone Company against the members of the New York Public Service Commission and the Attorney General of the State, asking an injunction against the enforcement of

two orders of the Public Service Commission as to telephone rates. By statute, counsel to the Public Service Commission was charged with the duty of representing and appearing for the people of the State of New York in any proceedings involving such questions and the counsel for the Commission had been made a party to the suit. The only interest which the City of New York had in the matter was in the capacity of a subscriber of the Telephone Company. The District Court denied leave to intervene. This Court dismissed the appeal (p. 316), saying:

> "There is nothing in this case to show that the Public Commission will not fully and properly represent the subscribers resident in New York City. Indeed it was said at the bar that the City and the Public Commission and the Attorney General were cooperating in every way in the defense of the suit. It was completely within the discretion of the District Court to refuse to allow the City to become a defendant when its interests and those of its residents were fully represented under the law and protected by those who had been made defendants."

A similar question arose in the case of *In re Engelhard & Sons Company,* 231 U. S. 646, where a telephone subscriber sought to intervene on behalf of himself and others similarly situated in an action which had been brought by the Cumberland Telephone & Telegraph Company against the City of Louisville to enjoin the enforcement of rates established by an ordinance of the City, which were claimed to be confiscatory. In overruling the petitioner's application, this Court held (p. 651):

> "The City was the proper party to make defendant in the suit as representative of all interested, and so throughout the whole proceedings. If we may suppose in a case like the present one there can be a

> distinction between the public interest and private interest, the subscribers of the company being the public, the representation of both interests was adequately fulfilled. It was in consequence of the motion of the city that the telephone company agreed to keep account of charges in excess of the ordinance rates, and, if they should finally be decided to be illegal, to pay into court the excess sums for distribution among its subscribers. It was the representative of all interests to provide for the creation of the fund; it is properly the representative of all interests to see to its proper distribution. This is a necessary deduction from the cases. It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them. As was said by Mr. Justice Miller, in *Chicago, Mil., & St. P. Railway Co.* v. *Minnesota,* 134 U. S. 418, 460, it was not competent for each individual having dealings with the regulated company 'to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way.' The rule has been repeated in subsequent cases."

Similarly in the case of *O'Connell* v. *Pacific Gas & Electric Co.,* 19 Fed. (2d) 460, a consumer was denied the right to intervene in certain suits brought by a utility company against a municipality to enjoin the enforcement of a certain ordinance reducing gas rates. The court held that the consumer was adequately represented by the authorities in the suit, even though it appeared that they might compromise their difficulties with the utility company on a less favorable basis than if the suit were prosecuted to final determination.

In the case at bar, the suit pending in the court below is being conducted by the Attorney General, who is charged

with the duty of enforcing the Anti-Trust Laws. He has been active in conducting that litigation. He filed the Government's supplemental complaint and he has vigorously presented the Government's views before the Special Master and before the District Court in the proceedings on the joint plan which was filed by Columbia Oil and Columbia Gas, providing, among other things, for the complete divestiture of Columbia Gas' stockholdings in Columbia Oil. In fact Mokan does not claim that the Attorney General is inadequately representing the interests of the general public in this litigation. Under the above authorities, therefore, Mokan as well as Panhandle Eastern, as members of the general public, are adequately represented by the Attorney General with respect to all issues involved in that litigation.

To the extent that Mokan seeks to intervene to protect such private rights as Panhandle Eastern might claim wholly apart from its rights as a member of the general public, then Mokan would be raising new issues not now before the Court. It is clear that Mokan and Panhandle Eastern would not "be bound by a judgment in the action" with respect to any such private rights because their assertion would raise issues outside the scope of the issues raised in the Government's suit. This same question was raised in *Radford Iron Co., Inc.* v. *Appalachian Electric Power Co.*, 62 Fed. (2d) 940; cert. den. 289 U. S. 748, in which the Radford Iron Co., Inc., which claimed that it was the owner of valuable mineral and timber lands on water tributary to the New River and that their value would be impaired if the waters of that river were impounded by a dam, sought to intervene in a proceeding which the Power Company had instituted against the Federal Power Commission to set aside an order of the Commission denying the Power

Company permission to construct such a dam. In denying intervention, the Court said (62 Fed. (2d) at page 943):

> "There can be no doubt, in view of the decision, of Ford & Son *v.* Little Falls Co., 280 U. S. 369, 50 S. Ct. 140, 74 L. Ed. 483, that the legal rights of the iron company will not be prejudiced or foreclosed by any decision in the pending suit to which it is not a party. * * * In short, if the iron company's right is one which might be made the subject of an independent suit, it will not be lost by any action of the court in this case. If, on the other hand, it is of a general character, held in common with the general public, it falls within the class which the Federal Power Commission is clothed with the power and the duty to protect. In either aspect, the appellant is not entitled as of right to intervene in this case."

Furthermore, Mokan or Panhandle Eastern would not even be entitled to permissive intervention—much less intervention as of right—for the purpose of injecting in the pending Government's suit new issues of a private nature having no relation to the issues tendered by the Government's supplemental complaint. As will hereafter be demonstrated (*infra,* pp. 56 to 59), Mokan by its intervention application seeks to introduce private claims raising wholly extraneous and foreign issues in the Government's suit, and, therefore, in any event the District Court, in the exercise of its sound discretion, was required under accepted standards to deny Mokan's application.

The last subdivision of new Rule 24(a), (Subdivision (3) thereof), refers to those cases where an applicant claims an interest in specific property in the custody of the Court. This basis for intervention as of right was an outgrowth of the old intervention practice in early English Equity, known as an examination *pro interesse suo,* where a party claiming

an interest in property in the control of the court was permitted to establish his claim to or lien upon such property. By judicial construction this principle was recognized in intervention practice under the old Equity Rule 37.

This Court in *United States* v. *California Cooperative Canneries,* 279 U. S. 553, referred to this class of cases as those "where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit, * * *." In the case of *Credits Commutation Company* v. *United States,* 177 U. S. 311, this Court on page 316 referred to cases in which the right to absolute intervention existed as those "where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated." In discussing cases of absolute intervention as compared with discretionary cases, the Circuit Court of Appeals for the Eighth Circuit, in the case of *Swift* v. *Black Panther Oil & Gas Co.,* 244 Fed. 20, which has been cited with approval on a number of occasions by this and other courts, said on page 30:

> "In intervention there are two classes of cases—one class in which the intervention is not indispensable to the preservation or enforcement of the claim of the petitioner, and there the permission to intervene is discretionary with the court; another class in which the petitioner claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court. The petitioner, who has a claim of the latter class, has an absolute right to intervene in the proceeding in which the court holds the exclusive custody and dominion of the property, permission for him to intervene is not discretionary

with the court, and he may review by appeal an order refusing that right. (Citations)."

The nature of the interest giving rise to intervention as of right in this class of cases is well set forth by this Court in *Smith* v. *Gale*, 144 U. S. 509, at pages 518-519:

> "These provisions of the Dakota code above cited are found in the codes of several of the States, and appear to have been originally adopted from Louisiana, wherein it is held by the Supreme Court, interpreting a similar section, that the interest which entitles a party to intervene must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties. * * * To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation."

According to the foregoing authorities, therefore, the nature of the interest which a person must have in order to entitle him to intervention as of right must be a direct and immediate interest in the nature of a property right in some fund or property which is in the exclusive custody of and is being administered by the court.

But Mokan does not claim for itself or for Panhandle Eastern any property right in any property which is being administered by the court below. The only property which is in the possession of Mr. Dunn, the Trustee appointed by the Court under the Consent Decree, is the preferred and common stock beneficially owned by Columbia Oil in Panhandle Eastern. Neither Panhandle Eastern nor Mokan have or claim to have any property right in that stock. It

is admittedly owned by Columbia Oil and the relief which Mokan requests is that some of the common stock be surrendered and cancelled and that the preferred stock be sterilized of voting power. This is not a claim of a property right in such stock upon which Mokan or Panhandle Eastern can assert a right to intervene as of right under subdivision (3) of new Rule 24(a).

In the second place, there is no property or fund in the possession of or being administered by the District Court. The shares of stock of Panhandle Eastern beneficially owned by Columbia Oil in the possession of Mr. Gano Dunn, as Trustee, cannot under any circumstances be construed as being "in the custody of the court or of an officer thereof" within the contemplation of Rule 24(a). This stock is not being administered by the District Court, nor is Mr. Dunn an administrative officer thereof. His duties as Trustee merely contemplate the holding of this stock for the sole purpose of seeing that the provisions and purposes of the Consent Decree are carried out and to ensure Panhandle Eastern freedom from control and domination by Columbia Gas. Although Mr. Dunn technically holds legal title to this stock to effectuate such purposes, he has no property interest in it, the entire ownership being in Columbia Oil. All dividends, except certain stock dividends, must be turned over by him to Columbia Oil and he must even vote the stock held by him as directed by Columbia Oil, provided such directions are not inconsistent with the objects of the Consent Decree (R. 147).

The facts in this case and in the case of *Washburn Crosby Co.* v. *Nee*, 13 Fed. Supp. 751, are not dissimilar. There Washburn Crosby Company brought suit to enjoin the collection of processing taxes on the ground that the taxes were invalid. The company had passed on these taxes to its customers and offered to restore to any cus-

tomer such taxes as he had paid in the event they were adjudged unconstitutional. As a condition to the issuance of a temporary injunction, the court required the Washburn Company to pay the taxes to the clerk of the court. Before the hearing on the permanent injunction, the processing taxes were declared unconstitutional and thereafter the petitioner made his application for leave to intervene claiming that he had paid processing taxes to the petitioner. In denying the application, the court said, at page 755:

> "Every penny of the fund was paid by the plaintiff into the custody of the court and was the property of the plaintiff. No one other than the plaintiff has ever acquired any title to that fund. It was paid into the custody of the court upon the clearly implied condition that if a permanent injunction should be granted it would be repaid to the plaintiff. In no true sense was the fund the subject-matter of the litigation. In no true sense, therefore, was it a fund undergoing administration in the court.
>
> Not only is there no fund here undergoing administration, but the proposed intervener has stated no facts showing that he has any right in the fund, any title, legal or equitable to, or lien upon, any portion of the fund."

While the above cases were decided prior to the adoption of the new Federal Rules of Civil Procedure, it is clear that the principle, requiring a property right in a *res* in the possession of and being administered by the court in order to entitle an applicant to intervention as of right, has not been changed by Subdivision (3) of new Rule 24 (a). This rule provides for intervention as of right "When the applicant is so situated as to be adversely affected by distribution or other disposition of

property in the custody of the court or of an officer thereof". An applicant could not be "adversely affected" under this rule unless he had a property right in a *res*, which is in the custody of the court and which the court is going to dispose of, of the same direct and immediate nature as was decreed necessary to support absolute intervention by the cases decided prior to the new rules. That new Rule 24 (a), Subdivision (3), created no change in the existing law was recognized by the court below when it denied Mokan's first intervention application involving the same facts and substantially the same prayers of relief as are involved in Mokan's fourth application. That decision remains unreversed. *United States* v. *Columbia Gas & Electric Corporation*, 27 Fed. Supp. 116, app. dis. 108 Fed. (2d) 614, cert. den. 309 U. S. 687. In its opinion in that case, the court below said at page 120:

> "This principle found expression in old Equity Rule 37, 28 U. S. C. A. following section 723. The new rule does not specifically set forth the nature of the interest in the property which a person must have in order to establish his claim to intervention as a matter of right. It is improbable that the Supreme Court in promulgating this new rule intended to destroy well established principles as the basis of intervention as of right. It would produce chaos to require the courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action."

There must also be an additional element present to entitle an applicant to intervention as of right, in addition to the requisite property interest in the *res* and the possession of that *res* by the court or an officer thereof. While it is a corollary to the principles hereinabove discussed, that additional element must not be lost sight of in testing

whether the applicant is entitled to intervention as of right. That element is that an applicant is not entitled to intervention as of right if he has available remedies which he may resort to for the protection of his interest outside of the suit in which he is seeking to intervene, so that a denial of his application for intervention will not be tantamount to a denial of relief. This principle was enunciated by this Court in *Credits Commutation Co.* v. *United States*, 177 U. S. 311, at page 316:

> "Cases of this sort" (referring to absolute intervention) "are those where there is a fund in court undergoing administration *to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated.*" (Italics ours.)

To the same effect is *Radford Iron Co., Inc.* v. *Appalachian Electric Power Co.*, 62 Fed. (2d) 940, at p. 943, cert. den. 289 U. S. 748:

> "Even if it should be supposed that the petition for intervention makes out a case of apprehended special damage on the part of the iron company, which would support an independent suit on its part against the power company to secure an injunction to prevent the obstruction of the stream, it does not follow that the iron company would be entitled to intervene in the present suit. Indeed the appellant concedes that, if an intervener has substantial rights which he can protect in independent proceedings, he will not usually be permitted to intervene in a suit between other parties, although it may relate to the same subject-matter. In Credits Commutation Company *v.* United States, 177 U. S. 311, 20 S. Ct. 636, 44 L. Ed. 782, it was said that an order denying leave to intervene in an equity cause is not regarded as a final determination of the merits of the claim

on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. It is only when he who seeks to intervene has a direct and immediate interest in a *res*, the subject of the suit, *and cannot otherwise protect his interest*, that the right of intervention is absolute, and a denial is the subject of an appeal (Citations)." (Italics ours.)

Swift v. *Black Panther Oil & Gas Co.*, 244 Fed. 20 (C. C. A. 8th), contains a similar holding at page 30:

> "As that one-fourth interest is within the exclusive jurisdiction of the court below in the Wildcat suit, and *as Swift's only remedy to collect the rent reserved in the lease he holds is by an intervention in that suit, the court below cannot justly deny him the right to intervene*, and to secure an adjudication of the merits of his claim therein, while at the same time it denies him, as it has in our opinion rightfully done, the right to enforce his claim outside that court by levy upon and application of the three-fourths interest going to the Panther to the payment of his claim." (Italics ours.)

The same rule is recognized in *Long* v. *Stites*, 63 Fed. (2d) 855, at page 858, cert. den. 290 U. S. 640:

> "Only those cases where the denial of intervention amounts to denial of relief furnish a basis for an appeal."

and also in the case of *Baxter* v. *McGee*, 82 Fed. (2d) 695, at page 698, cert. den. 298 U. S. 680:

> "The ruling of the court" (dismissing the petition of intervention) "was right. It leaves the intervener free to institute such action as he may be advised for the assertion of his alleged rights."

This same rule also applies in cases involving inadequacy of representation. See *Palmer* v. *Bankers' Trust Co.*, 12 Fed. (2d) 747, at page 752:

> "In some cases the facts and circumstances may be such that to deny the intervention would be error on the part of the chancellor; for example, where the *petitioner*, not being already fairly represented in the litigation, *is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form.* In such cases the right of intervention is often termed absolute (Citations)." (Italics ours.)

Mokan's application tenders issues entirely extraneous and foreign to the issues tendered by the Government's supplemental complaint in the pending suit in the District Court. They merely raise private controversies with the corporate defendants (*infra*, p. 56 to p. 59). Mokan or Panhandle Eastern may readily assert any claims which they may have for damages against such defendants in an independent proceeding outside of the pending suit. The District Court is not administering and about to dispose of any fund or property in which Mokan or Panhandle Eastern has any rights. Therefore, the denial of Mokan's intervention application will not amount to a denial of relief. The District Court, on the identical facts presented by this case, held, in denying Mokan's first intervention petition, *United States* v. *Columbia Gas & Electric Corporation*, 27 Fed. Supp. 116, at page 121, app. dis. 108 Fed. (2d) 614, cert. den. 309 U. S. 687:

> "Outside this suit Mokan can assert any claim for damages it may have against the defendants or for relief against Dunn for his alleged breaches of trust. Such a right has been recognized by this court."

The foregoing finding stands unreversed.

* * * * * *

Under none of the principles or tests discussed in the foregoing Subdivision (a) of this Point I can Mokan make out a case for intervention as of right. It follows that its fourth intervention application was addressed to the discretion of the court below and that the order of the court below denying such application, was at the most discretionary.

(b) Discretionary orders denying motions for leave to intervene are not final orders and are not appealable to this or any other court.

The courts have consistently held that discretionary orders denying motions for leave to intervene do not have the necessary finality on which to base appeals to any court.

In the leading case on this subject, *Credits Commutation Company* v. *United States*, 177 U. S. 311, this Court, quoting with approval from the opinion of the Circuit Court of Appeals, said at page 315:

> "'When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court'. . ."

This same principle was recognized in the case of *Central Trust Company* v. *Chicago, Rock Island & Pacific Railroad Company*, 218 Fed. 336 (C. C. A. 2nd), the court saying at page 339:

> "The general rule is that the denial of a petition to intervene is discretionary and therefore not appealable.* * *"

To the same effect is the case of *City of New York* v. *Consolidated Gas Company*, 253 U. S. 219, at page 221:

> "The application was addressed to the discretion of the District Court, and the order appealed from was not of that final character which furnished the basis for appeal (Citations)."

And also the case of *City of New York* v. *New York Telephone Company*, 261 U. S. 312, at pages 316-317:

> "It was completely within the discretion of the District Court to refuse to allow the City to become a defendant when its interests and those of its residents were fully represented under the law and protected by those who had been made defendants.* * * Indeed it was there said" (referring to *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219) "that an order like the one here objected to was not of such a final character as to furnish the basis of an appeal (Citations)."

See also *Long* v. *Stites*, 63 Fed. (2d) 855, at page 858, cert. den. 290 U. S. 640 (cited, *supra*, p. 27); and *Radford Iron Co., Inc.* v. *Appalachian Electric Power Co.*, 62 Fed. (2d) 940 at page 943, cert. den. 289 U. S. 748 (cited, *supra*, pp. 26-27).

The new Federal Rules of Civil Procedure have not changed the well established principle that a discretionary

order denying leave to intervene is not a final order on which an appeal can be based.

Palmer v. *Guaranty Trust Co. of New York*, 111 Fed. (2d) 115, 117 (C. C. A. 2d);

American Brake Shoe & Foundry Co. v. *Interborough Rapid Transit Co.*, 112 Fed. (2d) 669, 670 (C. C. A. 2d).

Therefore, since the order denying Mokan's fourth intervention application, which is appealed from herein, is at the most discretionary as hereinbefore demonstrated in subdivision (a) of this Point I, it does not have the finality on which to base an appeal to this or any other court, and there is no jurisdiction in this Court to review the matter.

There is no mention in appellant's brief of any principles of intervention practice on which it relies, or that what appellant is seeking to do on behalf of Panhandle Eastern is to intervene in the anti-trust suit pending in the District Court. Likewise, appellant's intervention application does not expressly state that it seeks leave to intervene; it merely requests (R. 539) "That leave be granted to file this application on behalf of Panhandle Eastern in accordance with the terms of said Section V" (referring to the Consent Decree) "and to become a party hereto" (the anti-trust suit) "for the limited purpose of enforcing the rights conferred by Section IV of said Decree". In other words, appellant studiously refrains from using the word "intervention". But the only procedure under the Federal Rules of Civil Procedure which is available to an outsider for the purpose of entering a pending suit as a party on his own initiative is the procedure of intervention prescribed by Rule 24. Mokan cannot seek intervention in the anti-trust suit and avoid compliance

with the requirements of that rule by the simple expedient of calling its application by another name or by refusing to call it by any name at all.

Paragraph V of the Consent Decree upon which the appellant relies expressly provides (R. 149) "that Panhandle Eastern, *upon proper application*, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof" (italics ours). Panhandle Eastern is not a party to the anti-trust suit pending in the District Court. It must make a *proper application* to become a party. Obviously, this means that if Panhandle Eastern desires to become a party to the suit, it must comply with the principles of intervention, and, if it cannot bring its application within the principles of intervention as of right, then its application must be addressed to the discretion of the court. Mokan, in making a derivative stockholder's application on behalf of Panhandle Eastern, must bring itself within the same principles of intervention practice. It cannot claim greater rights than Panhandle Eastern. Since its application does not state a case of intervention as of right, as hereinabove demonstrated, its application must have been addressed to the discretion of the District Court. The District Court, in the exercise of its sound discretion, denied the application, and rightly so, because any application on behalf of Panhandle Eastern must be made for the purpose of enforcing its rights *under the Consent Decree* and not in derogation thereof (See Points IV and V of this brief, *infra*, p. 56 to p. 61). Also Mokan is guilty of laches which, of itself, would be sufficient grounds for the denial of its application (See Point VI of this brief, *infra*, p. 61 to p. 63).

The order of the court below denying Mokan's application, being at the most discretionary, is not appealable, as we have just demonstrated, to this or any other court.

POINT II.

This Court should dismiss appellant's appeal on the ground that it has no jurisdiction to review the order appealed from for the further reason that under the provisions of the Expediting Act, as construed by this Court, no appeal in equity suits under the Federal Anti-Trust Laws wherein the United States is complainant can be taken to this or any other Court from an order which is not a final order.

Prior to the enactment of the Expediting Act, all appeals in equity suits instituted by the United States under the Federal Anti-Trust Laws were first taken to the circuit courts of appeals and then to this Court.

This procedure was changed completely by the above-mentioned Act (U. S. C. A., Title 15, Sections 28-29), which became law on February 11, 1903. This Act consists of two sections. The first section (U. S. C. A., Title 15, Section 28) deals with suits in equity instituted under the Federal Anti-Trust Laws wherein the United States is complainant. The second section (U. S. C. A., Title 15, Section 29) reads as follows:

> "APPEALS TO SUPREME COURT. In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. (Feb. 11, 1903, c. 544, Sec. 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)"

The purpose of this enactment was to effect a more speedy disposition of suits in equity instituted by the

United States under the Federal Anti-Trust Laws. In thus construing the purpose of the act, this Court said in *United States* v. *California Cooperative Canneries,* 279 U. S. 553 (1929), at page 558:

> "Congress sought by the Expediting Act to ensure speedy disposition of suits in equity brought by the United States under the Anti-Trust Act. Before the passage of the Expediting Act the opportunities for delay were many. From a final decree in the trial court under the Anti-Trust Act an appeal lay to the Circuit Court of Appeals; and six months were allowed for taking the appeal. From the judgment of the Court of Appeals an appeal lay to this Court; and one year was allowed for taking that appeal. Act of March 3, 1891, c. 517, §§6, 11, 26 Stat. 826, 828, 829. See *United States* v. *E. C. Knight Co.,* 60 Fed. 306; 60 Fed. 934; 156 U. S. 1; *United States* v. *Trans-Missouri Freight Association,* 53 Fed. 440; 58 Fed. 58; 166 U. S. 290. Moreover there might be an appeal to the Circuit Court of Appeals from a decree granting or denying an interlocutory injunction, Act of June 6, 1900, c. 803, 31 Stat. 660."

In the *Canneries* case just referred to; the contention was made that the Expediting Act did not apply to appeals from decrees which were not final decrees and that the circuit courts still had jurisdiction of such appeals. This Court (bottom of p. 557 to top of p. 558) dismissed this argument as "unsound", and then went on to state that the provisions of the Expediting Act, when applied to final decrees in equitable Anti-Trust suits, required appeals from such decrees to be taken direct to this Court, but, when applied to decrees in equitable Anti-Trust suits that were not final decrees, precluded the possibility of taking any appeals from such decrees either to the circuit courts or

to this Court, thereby cutting off any right which had previously existed to take appeals from such decrees to the circuit courts. This Court said at page 558:

> "Thus, Congress limited the right of review" (referring to the provisions of the Expediting Act) "to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either Court" (referring to the Circuit Court of Appeals and to this Court) "from an interlocutory decree."

This cause in which Mokan seeks to intervene is a suit in equity which was instituted under the Federal Anti-Trust Laws in the District Court of the United States for the District of Delaware, wherein the United States is complainant. Consequently it comes within the class of cases to which the Expediting Act applies. But it is clear that the order appealed from is not a final decree within the meaning of the Expediting Act. It does not dispose of all matters. This is particularly apparent when it is remembered that Mokan is left free to institute an action for damages outside of this suit (*supra*, p. 28). Furthermore, it has heretofore been demonstrated in subdivision (b) of Point I that discretionary orders denying leave to intervene are not sufficiently final for the purpose of any appeal. This same rule has been recognized by this Court in connection with discretionary orders denying leave to intervene in suits in equity under the Federal Anti-Trust Laws in *United States* v. *California Cooperative Canneries*, 279 U. S. 553 at 556:

> "That Court" (the Court of Appeals of the District of Columbia) "* * * did not refer to the decisions which hold that an order denying leave to intervene is not appealable (Citations), except where

> he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit (Citations)."'

The exception referred to in the last cited case, of course, refers to the limited class of cases in which the absolute right to intervene exists. As we have shown in subdivision (a) of Point I, Mokan does not bring its application within this limited class of cases.

In its brief (p. 3) Mokan claims that this Court in the *Canneries* Case and the Circuit Court of Appeals for the Third Circuit in dismissing the order of the District Court denying Mokan's first intervention application (108 Fed. (2d) 614, cert. den. 309 U. S. 687) held that this Court had exclusive jurisdiction of an appeal from an order denying intervention in a suit in equity under the Anti-Trust Laws brought by the Attorney General. We do not so construe the holdings in those cases. They merely hold that the circuit court of appeals (the Court of Appeals of the District of Columbia in the *Canneries* Case) did not have jurisdiction to review such appeals under the Expediting Act. This Court in the *Canneries* Case went on to hold (p. 558) that the Expediting Act precluded the possibility of an appeal either to the circuit courts or to this Court from an interlocutory decree, and (p. 556) that discretionary orders denying leave to intervene likewise were not appealable to any court.

It is quite apparent that the order appealed from, being at the most discretionary, is not appealable to any court, and in addition, under the construction of the Expediting Act adopted by this Court, is likewise not final and, therefore, not appealable either to the Circuit Court of Appeals or to this Court under the provisions of that act.

POINT III.

Even assuming that the order appealed from denying Mokan's fourth intervention application should be construed as a final appealable order, then this Court should nevertheless affirm that order because the order of the District Court denying Mokan's first intervention application would be equally a final appealable order and completely *res judicata* as to all matters on which Mokan's fourth intervention application is based.

It has been demonstrated in Point I hereof that the order denying Mokan's fourth intervention application is not final and not appealable (R. 541-542). If, however, that order should be construed as final, then it follows that the order denying Mokan's first intervention application (R. 321-322), which is similar in all respects to the order denying Mokan's fourth intervention application, has an even greater degree of finality as it remains unreversed and cannot now be appealed from (108 Fed. (2d) 614, cert. den. 309 U. S. 687). The question, therefore, arises whether Mokan is barred and estopped under the well established principles of *res judicata* by the order denying Mokan's first intervention application from maintaining its fourth intervention application. The principles of *res judicata* would apply only if this Court should construe the order denying Mokan's first intervention application as a final order instead of as a discretionary order, since only final orders are *res judicata*. Therefore, for the purpose of this Point III, we shall assume that that order is a final order.

The general rule, which has been universally adopted by the courts in determining whether a final judgment or decree is *res judicata* and operates as an estoppel with re-

spect to a subsequent action in whole or in part, was well stated by this Court in *Baltimore Steamship Company* v. *Phillips*, 274 U. S. 316, which restated the rule enunciated in the leading case of *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-3, as follows at page 319:

> "The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-353; *United States* v. *Moser*, 266 U. S. 236, 241."

See also *Moffett* v. *Robbins*, 81 Fed. (2d) 431, 435 (C. C. A. 10th), cert. den. 298 U. S. 675.

To determine whether this rule applies to the case at bar, it becomes necessary to ascertain from an examination of the first intervention application (R. 284-312) and the fourth intervention application (R. 526-540), in the light of the manner in which the courts have construed the rule, whether the same cause of action and the same parties, or their privies, are involved in both applications, and, if the fourth application is based upon a different cause of action, whether the matters in issue on the fourth intervention application were actually at issue and decided by the order denying the first intervention application. Therefore, it

becomes necessary to examine the allegations and prayers for relief in the fourth application as compared with those in the first application.*

The first eight paragraphs of the fourth application are simply formal and introductory. The same comment may be made as to the first nine paragraphs of the first application Paragraphs IX, X, XI, XII, XIII and XIV of the fourth application deal with the execution of the so-called Detroit Contract, the location of Panhandle Eastern's pipe line and its easterly terminus at the time of the execution of the Detroit Contract, the provisions of the Detroit Contract relating to the financing of the re-inforcements to Panhandle Eastern's existing pipe line and of the construction of the so-called Detroit extension, the provisions of the decree relating to such financing and construction, the alleged wrongful construction and ownership through Columbia Gas' wholly owned subsidiary, Michigan Gas, of the Detroit extension, the alleged receipt by Columbia Gas of excessive profits therefrom, the alleged domination by Columbia Gas, by reason of its ownership and operation of the Detroit extension, of natural gas markets in Indiana, southeastern Michigan, western Ohio, and elsewhere, the alleged exclusion of Panhandle Eastern therefrom, and the alleged improper provisions of a contract between Michigan Gas and Panhandle Eastern, providing for an alleged unreasonable allocation as between them of prices received under the Detroit Contract. These same allegations are

* On examination of the analysis of the similarity between the first and fourth intervention applications contained on pages 55-57 under Point IV of Columbia Gas' brief, we find no difference in substance between that analysis and a similar analysis starting in the next paragraph on this page and continuing to page 43 hereof. We, therefore, suggest that this Court dispense with the reading of the analysis contained herein if it has already examined the analysis in Columbia Gas' brief. However, we have not eliminated the analysis in this brief for the reason that it may serve the convenience of this Court to have such an analysis included herein.

contained in paragraphs X, XI, XII, XIV, XV and XVI of the first application in the same order and almost word-for-word.

Paragraph XV of the fourth application complains of the alleged wrongful acquisition by Columbia Oil of an additional 80,000 shares of the common stock of Panhandle Eastern in connection with the furnishing of funds to Panhandle Eastern to finance the re-inforcements to its pipe line, the alleged control by Columbia Oil of a majority of the Board of Directors of Panhandle Eastern, and the alleged willingness of Mr. Dunn, the Trustee under the Consent Decree, to carry out the wishes of Columbia Oil and Columbia Gas. For the most part these identical allegations may be found in paragraph XVIII of the first application, the remaining allegations of paragraph XV of the fourth application being a condensation of the same substance alleged in more detail in paragraphs XX, XXIV and XXVI of the first application.

Paragraphs XVI, XVII, XVIII and XIX of the fourth application deal with the alleged control by Columbia Gas of the business and affairs of Columbia Oil, the alleged use of such control by Columbia Gas to cause Columbia Oil to join in a combination and conspiracy in violation of the Anti-Trust Laws, the alleged failure of the Consent Decree to terminate the control by Columbia Gas through Columbia Oil of Panhandle Eastern, the alleged impropriety of the issue to Columbia Oil of 100,000 shares of Class A and 10,000 shares of Class B preferred stock of Panhandle Eastern and of the alleged improper provisions thereof, particularly the provisions of the Class B stock, and the transfer by Columbia Oil to Mr. Dunn, as Trustee under the Consent Decree, of the Class A and Class B preferred stock and the additional shares of common stock of Panhandle Eastern. The same substance in a more elaborate

form is contained in paragraphs XIX, XXV, XXVI, XX and XXXII of the first application.

Paragraphs XX and XXI of the fourth application complain of the execution of the March 17, 1936 agreement between Michigan Gas and Panhandle Eastern, of certain of the provisions of said agreement, and of the alleged purposes, intent and effect of that agreement. The same allegations almost word-for-word are contained in paragraphs XXI and XXII of the first application. Paragraph XXII of the fourth application is purely formal and deals with the efforts of Mokan to have Panhandle Eastern make this application and its alleged refusal and reasons therefor.

The prayers for relief in the fourth application are substantially the same as the prayers contained in the first application, except somewhat more limited in scope. The prayers contained in paragraphs (1) and (5) of the fourth application are merely formal in nature. The prayer contained in paragraph (2) is that a trustee be appointed to hold all the stock of Michigan Gas and dividends thereon for the benefit of Panhandle Eastern and that Columbia Gas transfer such stock and all its interest in Michigan Gas to said trustee. A corresponding prayer is contained in subparagraphs (a) and (b) of paragraph 2 of the first application, which provides that Columbia Gas shall hold the Detroit extension (which is the pipeline owned by Michigan Gas) as trustee for the benefit of Panhandle Eastern and that Columbia Gas transfer such extension, interests therein and the issues and profits thereof to Pandhandle Eastern. While there is some slight difference between these prayers with respect to the mechanics to be adopted, the same object is sought to be achieved in both cases, namely, the divestiture and transfer to Panhandle Eastern by Michigan Gas of all its interests in the Detroit extension.

Relief clause (3) of the fourth application requests the surrender by Mr. Dunn of 80,000 shares of the common stock of Panhandle Eastern beneficially owned by Columbia Oil in exchange for a new security having no voting power. A similar prayer is contained in paragraph 2(c) of the first application, which requests the surrender of the same shares of stock at cost. While the mechanics are slightly different, the scope and object of the relief requested in these two clauses are the same. Relief clause (4) of the fourth application requests that the Class A and Class B preferred stock of Panhandle Eastern held by Mr. Dunn and beneficially owned by Columbia Oil be sterilized of voting power. A similar prayer is contained in paragraph 2(c) of the first application, which requests the surrender of such stock at cost. The purpose of both clauses is to eliminate the voice of this stock in the conduct of Panhandle Eastern's affairs. While the prayer in the first application contemplates a more drastic method for accomplishing this result, the object sought to be accomplished by these clauses is the same. Relief clause (6) of the fourth application contains the general prayer for further relief. The corresponding prayer in the first application may be found in paragraph 4 thereof.

The only instances in which the prayers in the first application differ from those contained in the fourth application are where they exceed the scope of the prayers in the fourth application. These instances are where the first application prays that the defendants be adjudged guilty of contempt for alleged violations of the decree (Relief Clause 1), that Columbia Oil sell its remaining shares of stock in Panhandle Eastern (Relief Clause 2(d)), that the exceptions set forth in Article II of the Decree be stricken out (Relief Clause 2(e)), and that Mr. Dunn be removed as Trustee (Relief Clause 3).

Furthermore, the same parties are involved in both applications and in the same capacities. Since counsel for Mokan have indicated on a number of occasions that Mokan's fourth application is a derivative application on behalf of Panhandle Eastern for relief to which Panhandle Eastern is entitled under Sections IV and V of the Consent Decree, while its first application was not, we desire to dispose of this contention by referring to Paragraph XXIX of the first application which quotes from Section V of the Consent Decree referring to the relief to which Panhandle Eastern might be entitled under Sections IV and V of the Decree, and by quoting from Paragraph XXXIII of its first application, as follows (R. 308):

> "XXXIII. That this Petition is filed by Mokan as the owner of a substantial interest in the capital stock of Panhandle Eastern as aforesaid, both in its own right and also in behalf of and for the benefit of Panhandle Eastern for reason that Panhandle Eastern has refused to intervene herein and to assert its rights arising out of the said violations of the said Decree."

From the foregoing discussion it is apparent that in substance the subject-matter of both applications is the same, the parties are the same, all the issues raised in the fourth application were raised, together with additional issues, in the first application, and all the relief requested in the fourth application is substantially the same as some of the relief requested in the first application.

In applying the general rule of *res judicata* referred to above (*supra*, p. 38), the results of the comparison of the two applications may be restated as presenting the following questions—whether the order denying the first application is *res judicata* with respect to the fourth application in view of the fact that: (1) the grounds on which

recovery is sought in the fourth application are more limited in scope in that Mokan is asserting in a derivative action only alleged rights of Panhandle Eastern under Sections IV and V of the Consent Decree; (2) while these grounds were set forth in Mokan's first application, they were not expressly considered by the Court in its opinion as one of the grounds on which it arrived at its decision denying the first application; and (3) the relief requested in the fourth application, although substantially the same as some of the relief requested in the first application and having the same object is narrower in scope and does not constitute all the relief requested in the first application.

Under well established principles, the cause of action on which the fourth intervention application is based is the same cause of action as that on which the first application was based. Therefore, this case falls within the first class of cases referred to in the general rule (*supra*, p. 38) and the denial of the first application would be *res judicata* on all matters which were presented, as well as those which might have been presented, on the first application. In discussing the elements involved in a consideration of whether the same or different causes of action are presented, this Court said in *Baltimore Steamship Company* v. *Phillips*, 274 U. S. 316, at page 321:

> "'A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action,

but they show its existence by making the wrong appear. "The *thing,* therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*" ' ".

Thus, the presentation of the more limited theory in the fourth application (whether or not presented in the first application), when such application is based on the same subject matter and requests substantially the same relief as were contained in the first application, does not prevent the operation of the doctrine of *res judicata.* The principle adopted in many cases of this kind is that all grounds in support of the same cause of action must be presented at one time and cannot be split. See *United States* v. *California and Oregon Land Company,* 192 U. S. 355, where this Court said at page 358:

"The parties, the subject matter and the relief sought all were the same. * * * The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.

"It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi. Phosphate Sewage Co.* v. *Molleson,* 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. S. C., 4 App. Cas. 801, 820. But the whole tendency of our decisions is to require

a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, *Fetter* v. *Beale*, 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331; Freeman, Judgments, 4th ed. §§238, 241; and, *a fortiori*, he cannot divide the grounds of recovery."

To the same effect is *Grubb* v. *Public Utilities Commission of Ohio*, 281 U. S. 470, where this Court said at pages 378-479:

"'The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Werlein* v. *New Orleans*, 177 U. S. 390, 398, *et seq*; *United States* v. *California and Oregon Land Co.*, 192 U. S. 355, 358.

"'As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *United States* v. *Moser*, 266 U. S. 236, 241; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.'"

See also:

Hubbell v. *United States*, 171 U. S. 203, at p. 209;

Werlein v. *New Orleans*, 177 U. S. 390, at p. 400;

Northern Pacific Railway Company v. *Slaght*, 205 U. S. 122, at p. 131;

Southern Minnesota Railway Extension Co. v. *St. Paul & S. C. R. Co.*, 55 Fed. 690, at p. 694 (C. C. A. 8th).

As was said in the case of *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, at p. 400; cert. den. 199 U. S. 607:

> "The test of identity of causes of action is the identity of the facts essential to maintain them."

It has been demonstrated that the facts alleged in both applications are in substance the same—for the most part in the same words.

A case very much in point with the instant case is *Manhattan Trust Co.* v. *Trust Co. of North America*, 107 Fed. 328 (C. C. A. 8th), cert. den. 181 U. S. 622. In that case a petitioner filed his intervention petition in a railroad foreclosure suit asserting a claim for rental of terminal property against the defendant and claiming that such claim was entitled to priority over the debt of the mortgagee by reason of an alleged statutory landlord's lien and also by reason of its being a preferential debt in equity. After the court dismissed this intervention petition, only mentioning in its opinion that the petitioner did not have a landlord's lien, petitioner filed an amended intervention petition asserting its equitable right to preferential payment of such rentals from a fund in the registry of the court accumulated by the receivers from the earnings of the road. The court, in dismissing the second intervention application, held that the dismissal of the first intervention application would be a bar to the second application, despite the fact that the ground on which the second application was based had not been expressly considered by the court in its opinion

denying the first intervention application, saying at page 332:

> "When the plaintiff rests his claim for relief in his bill on two or more grounds, and his bill is dismissed generally on its merits, he is thereafter estopped from maintaining a second bill seeking the same relief upon one of the grounds set up in his first bill and in issue under the pleadings. A judgment or decree rendered upon the merits constitutes an absolute bar to a subsequent action on the same claim or demand, and it is no answer to the plea of estoppel in such a case to say the court did not, in its opinion, consider the particular ground of relief. Its decree dismissing the bill on its merits covers all the grounds for relief set up in the first bill and put in issue by the pleadings as fully and effectually as if they had been specifically named in the court's opinion. Any other rule would make litigation interminable. As long as a party could show that the court, in its opinion, took no notice of one of its alleged grounds for relief, he could file a new bill seeking the same relief sought by his first bill on that ground, and so on as long as any one of the grounds of relief set up in his first bill was not discussed, and in terms decided against him, in the opinion of the court."

But even if the first and fourth intervention applications should be regarded as based upon different causes of action, it is clear from the cases that this case would fall squarely within the second class of cases of the general rule where the ground or matter involved in the subsequent suit cannot be urged since it was in issue and decided in the prior suit. It is settled that when a claimant rests his claim for relief in his complaint or bill on several grounds and the bill is dismissed generally without a specific adverse ruling on one of the grounds, the complainant is thereafter

estopped from maintaining a subsequent bill seeking similar relief on the basis of the ground which was not expressly ruled upon, but which was necessarily decided by the court in dismissing the first bill, whether or not the prior and subsequent actions are upon the same cause of action.

This result was reached in the case of *Venner* v. *Chicago City Ry. Co.*, 195 Fed. 788; aff'd 200 Fed. 1023. This case is of special interest since the complainant's second bill was based upon more limited or confined grounds than the first bill, which had been dismissed, the complainant having eliminated from the second bill the grounds on which the Court had expressly dismissed the first bill for multifariousness and laches. Nevertheless, the Court dismissed the second bill, saying, at page 789 (195 Fed.):

> "Complainant seeks to deduce from the fact that the Supreme Court dismissed the writ of error issued in said cause that the court did not deem the federal questions presented in his bill to be involved in that proceeding. No such deduction may in fact be made. There are other hypotheses upon which such action might have been taken. While counsel for defendants in error in that cause did call the attention of the Supreme Court of the United States to the fact that other than federal questions were presented, he also presented to the court the legal insufficiency of the allegations of the bill, with reference to the federal questions aforesaid."

The Court of Appeals of the District of Columbia arrived at the same decision in the case of *United States* v. *Interstate Commerce Commission*, 8 Fed. (2d) 905, at page 906, cert. den. 270 U. S. 651:

> "That contention is answered by the fact that the actual judgment upon the issues presented in the former case was rendered by the trial court. The

petitioner in the case sought a remedy in that court by mandamus, or alternatively by certiorari; but the court denied it any remedy whatever, and dismissed the petition. This was an adjudication of all the issues raised in the case below, both as to substantive rights and the remedies sought. The judgment was affirmed by this court, without modification, and the force and effect of the adjudication remained as before the appeal.

"It is said by the appellant that the question of certiorari was not given serious consideration, either by the court or counsel, in the former proceedings. This, however, does not alter the situation, for the question was expressly raised in the case, and it was not reserved out of the judgment. It must therefore be considered as adjudicated therein."

To the same effect is the decision of this Court in *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470, at pages 477-478:

"In the opinion of the state court there is no express mention of the constitutional grounds on which the appellant asked a reversal of the order excluding the loop over the Ohio River at Portsmouth; and from this it is argued that the constitutional validity of the order was not determined, and therefore as to that matter the judgment is not *res judicata*. But the argument is not sound. The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it."

The case at bar presents the same situation as the foregoing cases in that the more limited ground for relief under

Sections IV and V of the Consent Decree presented in support of the fourth intervention application was necessarily presented to and decided by the court below on the first intervention application. On that application intervention was requested on more limited grounds and also on broader grounds. By completely denying intervention, the court necessarily decided that Mokan and Panhandle Eastern (as that was an application by Mokan in its own right and also as a stockholder on behalf of Panhandle Eastern) were not entitled to intervention either on the more limited grounds or on the broader grounds, despite the fact that the court did not expressly pass upon the more limited grounds in its opinion. But even if it were the case that the more limited grounds had not actually been presented to the court and were now presented for the first time in support of the fourth application, nevertheless, the more limited grounds were necessarily within the scope of the issues which were decided by the court when it denied the first application in toto, and, therefore, whether or not both applications are based on the same cause of action, Mokan would be barred from now urging the more limited grounds in support of its fourth application. The courts have universally so applied the rule in cases of this kind, even though the grounds on which the subsequent suit is brought were not brought to the attention of the court on the first suit. This Court so held in the case of *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, at pages 48-49:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit

> is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

This Court held to the same effect in the case of *Gunter, Attorney General of the State of South Carolina* v. *Atlantic Coast Line Railroad Company*, 200 U. S. 273, saying at page 290:

> "The complaint in the *Pegues* case, it is said, mistakenly averred that the Cheraw and Darlington Railroad had not been built at the time the amendment of the charter was made which gave the exemption relied upon, and as this, it is asserted, was not traversed by the answer filed in the case by the Attorney General it was consequently erroneously assumed to be true in fact, and the decree, it is argued, was based upon such assumption. From this the contention is that if the truth had been established a different decree would have been rendered, because no consideration for the grant of exemption would then have appeared. But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the *Pegues* case, since all defenses then existing to the asserted right of

exemption, whether brought to the attention of the court or waived, were foreclosed by the decree. *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; *Fayerweather* v. *Ritch*, 195 U. S. 276, 300 *et seq.*, and cases cited."

To the same effect is the decision of this Court in *Northern Pacific Railway Company* v. *Slaght*, 205 U. S. 122, at page 133:

> "In other words, plaintiff in error, as successor of the Spokane and Palouse Railway Company, again asserts title to the very property that was the subject of the other suit, the source of title, only, being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim? The principle of *res adjudicata* and the cases enforcing and illustrating that principle declare otherwise."

See also *City of Boston* v. *McGovern*, 292 Fed. 705, at p. 711 (C. C. A. 1st); cert. den. 265 U. S. 581.

Where, as here, the parties and the subject matter are the same in both applications, the fact that the relief prayed for in the fourth application is slightly different is immaterial when the object sought to be achieved is the same—the doctrine of *res judicata* is nevertheless a complete bar to the fourth application. This is a well established rule and is stated in *Fagin* v. *Quinn*, 24 Fed. (2d) 42, at pp. 43-44; cert. den. 277 U. S. 606:

> "We are of opinion that the plea of *res judicata* interposed by appellees ought to be sustained. The parties who brought the suit in the state court in 1919 and the parties to this suit are the same, and the subject-matter is the same. * * *

> Where the issues are identical, the fact that the relief prayed for is slightly different is immaterial."

To the same effect is *Werlein* v. *New Orleans,* 177 U. S. 390, 400. The Circuit Court of Appeals for the Eighth Circuit reached the same conclusion in *Sapulpa Petroleum Co.* v. *McCray,* 4 Fed. (2d) 645, saying at p. 650:

> "So it is that the real parties in interest in the former suit and in this suit are the same or the representatives of the same interests. McCray is the plaintiff in the former suit; McCray is the plaintiff in this suit. The two Burnetts and the receiver of the Sapulpa Company were the defendants in the former suit; the two Burnetts and the Sapulpa Company and its receiver are the defendants in this suit. The subject-matter of the two suits was the same—the two leases, the possession and proceeds thereof. The object sought by the plaintiff in the two suits was the same—the title and possession of that *res.*"

It is clear that while the grounds on which relief is sought in Mokan's fourth intervention application are more limited but within the scope of the grounds urged in support of its first intervention application, and although the relief requested in the fourth intervention application is not exactly the same, the object sought to be accomplished in the fourth application is the same as was sought to be accomplished in the first application and the parties and subject-matter are the same on both applications. Therefore, under the foregoing authorities, since the applications are based on the same cause of action and since the more limited ground for relief under Sections IV and V of the Consent Decree could have been litigated on the first application, this ground cannot again be urged in support of the claim presented by the fourth application; and even if the

claim presented by the fourth application was based on a different cause of action, the limited ground was presented to the court and necessarily decided on the first application and cannot now be urged.

That the foregoing principles of *res judicata* are equally applicable to final orders denying intervention applications, (and as previously explained we are assuming for the purpose of this point that the order denying the first application was a final order), as well as to final orders and decrees in other suits and proceedings, has been affirmatively decided. The Circuit Court of Appeals for the Seventh Circuit reached this conclusion in the case of *United States Trust Co. of New York* v. *Chicago Terminal Transfer R. Co.*, 188 Fed. 292, saying at pages 299-300:

> "If the order of January 5, 1910, denying leave to intervene, is appealable, it is so because it is a final order or decree against appellants. If so, the order of April 17, 1909, denying leave to intervene, was equally a final order or decree. If, prior to April 17, 1909, the stockholders had an absolute right to intervene on the cause of action stated, they had as perfect a right to file their petition and be heard as they would have to file their original bill or declaration on any cause of action and be heard. Suppose a suitor should file an original bill, and the court should decline to hear him and should enter a final decree dismissing the bill for lack of merit on its face. Could such a suitor require the court to hear the same cause of action on a second bill which disclosed the former proceedings and adjudication? We are of opinion that the answer applies to the present case. No inadvertence or mistake, as ground for amendment of the second petition, was advanced. If there had been ground for amendment, the amendment should have been made before the final order was entered. If the ground was not known until

> afterwards, an application to vacate the final order or a petition for review should have been made in the Circuit Court. Without getting rid of that final order by proceedings either in the Circuit Court or on appeal, the stockholders could not thereafter compel a hearing of the same complaint. If that is not so, then appellants might also have ignored the final order of January 5, 1910, and have renewed their application as many times as they pleased."

See also *Manhattan Trust Co.* v. *Trust Co. of North America,* 107 Fed. 328 (C. C. A. 8th), cert, den. 181 U. S. 622 (previously discussed, *supra,* pp. 47-48), and *McDonald* v. *Seligman,* 81 Fed. 753, at page 759 (C. C., No. Dist. of Calif.).

POINT IV.

The District Court was correct in denying Mokan's fourth intervention application because Mokan cannot intervene for the purpose of injecting into the Government's Anti-Trust suit issues of a private nature outside of the scope of the issues involved in that suit.

The only issues involved in the Government's anti-trust suit are: (a) whether the Government's interpretation of the purposes of the Consent Decree is correct and (b) if so, whether the Consent Decree should be supplemented by a further order requiring either Columbia Gas to dispose of its stockholdings in Columbia Oil or Columbia Oil to dispose of its stockholdings in Panhandle Eastern (R. 274-283). Many new issues are raised in Mokan's fourth intervention application (R. 526-540), among which are: (a) whether a trustee should be appointed to hold for the benefit of Panhandle Eastern, and Columbia Gas should

be ordered to turn over to such trustee, all the stock which it holds in Michigan Gas and all its interests in such company, (b) whether Mr. Dunn, the Trustee under the Decree, should be directed to surrender to Panhandle Eastern 80,000 shares of its capital stock beneficially owned by Columbia Oil in lieu of the issue to Columbia Gas and Columbia Oil by Panhandle Eastern of new securities having no voting rights, and (c) whether Mr. Dunn should be directed to vote the common stock and preferred stock of Panhandle Eastern held by him and beneficially owned by Columbia Oil in such a manner that the provisions of such stock may be amended to eliminate the voting powers thereof.

An examination of Mokan's fourth intervention application discloses that it is in the nature of a suit by a minority stockholder against a majority stockholder for the purpose of recovering moneys and properties to which Mokan claims Panhandle Eastern is entitled and of which Mokan claims Panhandle Eastern has been allegedly deprived by reason of certain agreements which Mokan claims were wrongfully entered into because of Columbia Oil's and Columbia Gas' alleged control of the management and affairs of Panhandle Eastern. This is merely a suit of a private nature and has no relation to the Government's anti-trust suit.

A similar attempt was made by the Torquay Corporation to intervene in the anti-trust suit of *United States* v. *Radio Corporation of America*, 3 Fed. Supp. 23, for the purpose of prosecuting private claims after the entry of a consent decree therein. Torquay Corporation challenged the fairness of certain transactions that had taken place between Radio Corporation, General Electric and Westinghouse, and the Court denied the intervention, saying (p. 25):

> "These inquiries have no relation to the relief sought in the government suit. As stated in Equity Rule 37 (28 U. S. C. A. §723), intervention shall be 'in subordination to, and in recognition of, the propriety of the main proceeding.' To allow the intervention here sought and embark upon a determination of the questions raised by petitioner would be to import into this case new issues. This cannot be done. United States *v.* Northern Securities Co. (C. C.), 128 F. 808. The United States and the public can have no interest in any controversy of Radio Corporation, its stockholders and creditors, against the General Electric and Westinghouse companies. The consent decree terminated what promised to be protracted and burdensome litigation. It was entered in the public interest and met the policy of the statutes."

Similarly, the Circuit Court for the Southern District of Minnesota, in the case of *United States* v. *Northern Securities Co., et al.*, 128 Fed. 808, held that a controversy between stockholders and the Securities Company regarding the manner in which the holdings of that company in two railway companies ought to be distributed was outside the scope of the issues in the main suit, saying, at page 813:

> "Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action, * * *."

The District Court of the District of Delaware reached the same conclusion in denying Mokan's first intervention application (*United States* v. *Columbia Gas & Electric Corporation*, 27 Fed. Supp. 116, at page 120, app. dis. 108 Fed. (2d) 614, cert. den. 309 U. S. 687), where the same

matters were presented as are now presented on Mokan's fourth intervention application:

> "The prayers of the proposed petition of intervention diverge sharply from the subject matter of the supplemental complaint. Affording petitioner relief would fundamentally alter and seriously complicate the character of this proceeding. The bare statement of the prayers sufficiently indicates how far they depart from the scope of the Government's complaint and how serious a delay would be involved in the determination of the questions raised thereby. The situation thus falls squarely within the last sentence of subdivision (b)" (referring to Rule 24(b) of the Federal Rules of Civil Procedure) "which codifies prior equity practice.
>
> 'The intervener was not entitled to come into the suit for the purpose of having adjudicated a controversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not by the intervener be so enlarged. It is limited to the field of litigation open to the original parties. * * * Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill.' Chandler & Price Co. *v.* Brandjten & Kluge, 296 U. S. 53, 57, 59, 56, S. Ct. 6, 8, 80 L. Ed. 39.
>
> 'It is apparent that, the right to become a party to the litigation being given, the range of activity of the newcomer in the prosecution or defense of the interest he is thus permitted to assert must necessarily be as extensive as, but no greater than, that allowed the original parties to the suit.' Leaver *v.* K. & L. Box & Lumber Co., D. C., 6 F. 2d 666, 667."

POINT V.

The District Court was correct in denying Mokan's fourth intervention application because intervention will not be permitted, after the entry of a decree in the main suit, for the purpose of attacking said decree or modifying the provisions thereof.

The Consent Decree entered January 29, 1936, in the Government's anti-trust suit permits Columbia Oil to retain its stockholdings and acquire additional stockholdings in Panhandle Eastern and to "exercise voting rights appurtenant thereto" subject to the trust of which Mr. Dunn was appointed trustee (R. 145), and also contemplates that Columbia Gas or any other person willing to advance funds to finance the same may, under certain restrictions therein imposed, build and acquire the ownership of the pipe line which was to be constructed to Detroit from the easterly terminus of Panhandle Eastern's pipe line at the Illinois-Indiana state line (R. 148). Columbia Gas furnished the necessary financing under a contract with Panhandle Eastern dated January 31, 1936, all with the approval of Mr. Dunn, the Government's representative (R. 152, 350-355), and the new pipe line was constructed and acquired by Michigan Gas, a wholly owned subsidiary of Columbia Gas (R. 163).

By its fourth intervention application Mokan seeks (a) to divest Columbia Oil of its beneficial ownership in 80,000 shares of the capital stock of Panhandle Eastern, (b) to sterilize the voting power of the Class A and Class B preferred stock in Panhandle Eastern also beneficially owned by Columbia Oil, and (c) to divest Columbia Gas of all its stock in Michigan Gas and other interests in such company.

This relief is a clear attempt to modify and vary the terms of the above-mentioned provisions of the Consent Decree and constitutes a direct attack upon and impeachment of that decree.

The authorities universally hold that intervention will not be allowed for such purpose. This Court said in *United States* v. *California Cooperative Canneries*, 279 U. S. 553 at page 556:

> "Nor did it" (Court of Appeals of the District of Columbia) "refer to the settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made."

In a footnote on the same page (p. 566), this Court set forth numerous authorities supporting the principle of law enunciated in the above quoted citation, to which this Court is respectfully referred.

POINT VI.

The District Court was correct in denying Mokan's fourth intervention application because Mokan is guilty of *laches* and is, therefore, barred from intervening in the Government's Anti-Trust suit.

The principal matters complained of by Mokan in its fourth intervention application (R. 526-540) are: (a) the contract entered into between Panhandle Eastern, Columbia Gas and Columbia Oil dated January 31, 1936 (R. 350-355) for the financing of the new pipe line to Detroit and the construction, acquisition and operation of said line by Michigan Gas (Paragraphs IX, X, XI, XII, XIII and XIV of said application), (b) the acquisition by Columbia Oil of 80,000 shares of the common stock of Panhandle Eastern in connection with such financing and the controlling stock

interest in Panhandle Eastern thus acquired by Columbia Oil (Paragraph XV of said application), (c) the acquisition by Columbia Oil of 100,000 shares of Class A and 10,000 shares of Class B preferred stock of Panhandle Eastern (Paragraph XVIII of said application), and (d) the provisions of the agreement dated March 17, 1936, between Panhandle Eastern and Michigan Gas (Paragraphs XX and XXI of said application).

But all of the foregoing matters were consummated in the first few months of 1936 (R. 152-154, 162-186, 219-236, 243, 350-355); many of them were contemplated by the Consent Decree and the stipulation of the parties on which the decree was entered (R. 138-149), and all of them were agreed to or ratified by the Receivers of Mokan on Mokan's behalf and by Panhandle Eastern and were released by general releases signed by the Receivers of Mokan on Mokan's behalf and by Panhandle Eastern (R. 152-154, 219-236, 249-274). Considerable sums of money have been expended by Columbia Oil in reliance upon these agreements. Mokan's first intervention application was made on February 6, 1939 (R. 284), and its fourth intervention application was made on April 16, 1940 (R. 526), nearly three and four years, respectively, after the matters complained of had been consummated.

Rule 24 of the Federal Rules of Civil Procedure provides that both intervention as of right and permissive intervention must be "Upon timely application * * *". This is in recognition of a uniform line of decisions rendered by the courts in interventions as of right as well as in permissive interventions that a person must move promptly or be barred by laches.

In the case of *United States Trust Co. of New York* v. *Chicago Terminal Transfer R. Co.*, 188 Fed. 292, where the petitioner for intervention delayed for two years after hav-

ing knowledge of the acts complained of, the court, in denying the application for leave to intervene, said at page 299:

> "These various moves do not impress us as being the acts of a suitor in equity who is conscious that he has a substantial interest and a substantial ground for asserting that interest, and who is anxious to prosecute his substantial rights with all reasonable diligence and without unnecessarily obstructing the course of litigation of other issues to which he is not a party."

Also see *Smith* v. *Gale*, 144 U. S. 509, 520-521. The District Court, on a similar state of facts presented by Mokan's first intervention application, said in denying that application that "Obviously Mokan's application is not a timely one" (*United States* v. *Columbia Gas & Electric Corporation*, 27 Fed. Supp. 116 at p. 119, app. dis. 108 Fed. (2d) 614, cert. den. 309 U. S. 687).

Conclusion.

Mokan or its attorneys have made four intervention applications for leave to intervene in the Government's anti-trust suit pending in the District Court. All of these applications have been based on substantially the same subject-matter. All of these applications have been denied by the District Court, the third one having been dismissed because of lack of authority in the attorneys to make and prosecute such application. The orders denying the first two intervention applications were appealed to the United States Circuit Court of Appeals for the Third Circuit which dismissed the appeals and thereupon a petition for a writ of certiorari to this Court was denied. Appeals from the orders dismissing the third intervention application and denying the fourth intervention application are

now pending before this Court. Two appeals from these same two last mentioned orders have also been taken by the appellant to United States Circuit Court of Appeals for the Third Circuit and are now pending in that court. Stipulations regarding the filing of the records on appeal and formally docketing the appeals in the Circuit Court have been entered into by the parties and are printed at the end of this brief as Appendices D and E.

It is our understanding that if this Court dismisses appeals Nos. 268 and 296, or affirms the orders appealed from on such appeals, the appellant intends to file the records on appeal and formally docket the appeals from these same two orders of the court below in the United States Circuit Court of Appeals for the Third Circuit, to proceed with the prosecution of such appeals, and if lost, to petition this Court for writs of certiorari to review the same matters which are now before this Court on these appeals, Nos. 268 and 269. Thus it appears that there will be no end to this litigation, irrespective of how many times the same matters have been decided at the instance of the same party. This apparent intention of the appellant to prosecute its appeals in the Circuit Court in the event of adverse decisions of this Court on Appeals Nos. 268 and 269 is the more surprising in view of the decision of this Court in the case of *United States* v. *California Cooperative Canneries*, 279 U. S. 553, at page 558, and of the United States Circuit Court of Appeals for the Third Circuit in the case of *Missouri-Kansas Pipe Line Company* v. *United States*, 108 Fed. (2d) 614, at page 615, that the Circuit Court has no jurisdiction to hear such appeals. Under these circumstances, appellee, Columbia Oil & Gasoline Corporation respectfully requests this Court, in the event it upholds said appellee's contentions herein and in appeal No. 269, to render such decisions as will finally bring to an end this multiplicity of proceedings and appeals.

Based on the arguments and authorities herein set forth, the appellee Columbia Oil & Gasoline Corporation respectfully requests this Court to dismiss Mokan's appeal from the order of the District Court denying its fourth intervention application for lack of jurisdiction, or, if this Court considers that it has jurisdiction, to affirm the order of the District Court.

Respectfully submitted,

DANIEL O. HASTINGS,
Continental American Building,
Wilmington, Delaware.

WILLIAM H. BUTTON,
27 Cedar Street,
New York, N. Y.

JAMES B. ALLEY,
50 Broadway,
New York, N. Y.

Of Counsel:

WILLIAM H. BUTTON,
JAMES B. ALLEY.

Appendix A.

Reported in 27 Federal Supplement, 116.

UNITED STATES v. COLUMBIA GAS & ELECTRIC CORPORATION, *et al.*

No. 1099

DISTRICT COURT, D. DELAWARE.

March 29, 1939.

In Equity. Suit under the Anti-Trust Act by the United States of America against Columbia Gas & Electric Corporation and others wherein a consent decree was entered and the United States filed a supplemental complaint for a judgment to effectuate the consent decree. On petition of the Missouri-Kansas Pipe Line Company for an order granting it leave to intervene and to file a petition.

Motion denied.

John J. Morris, Jr., U. S. Atty., of Wilmington, Del., and Milton Katz, Sp. Asst. to Atty. Gen. (C. Thurman Arnold, Asst. Atty. Gen., and Wendell Berge and Hugh B. Cox, Sp. Assts., to Atty. Gen., on the brief), for United States.

Clarence A. Southerland (of Ward & Gray), of Wilmington, Del., and Douglas M. Moffat (of Crayath, de Gersdorff, Swaine & Wood), of New York City, for defendant Columbia Gas & Electric Corporation.

Daniel O. Hastings, of Wilmington, Del., and William H. Button and Auchincloss, Alley & Duncan, all of New York City, for defendant Columbia Oil & Gasoline Corporation.

Steward Lynch, of Wilmington, Del., and Kenneth E. Walser and Richard B. Hand, both of New York City, for Missouri-Kansas Pipe Line Co., petitioner for leave to intervene.

NIELDS, District Judge.

Missouri-Kansas Pipe Line Company, a Delaware corporation, moves the Court for an order granting it leave

to intervene in this proceeding and to file the petition annexed to its motion and requiring defendants respectively to answer or otherwise plead thereto.[1]

Petitioner alleges it owns 324,326 shares of the 728,652 shares of the outstanding common stock of Panhandle Eastern Pipe Line Company.

This suit in equity was brought by the Attorney General of the United States under the Anti-Trust Acts, 15 U. S. C. A. §1, *et seq.* The defendants duly answered and denied the material allegations of the bill. Upon a stipulation between the parties to this cause a consent decree (hereinafter referred to as "consent decree") was entered on January 29, 1936. Section V of that decree provided: "That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance herewith and the punishment of evasions hereof, and for the further purpose of making such other and further orders and decrees or taking such other action as may from time to time be necessary to the carrying out hereof; and that Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof."

December 21, 1938 United States of America filed its supplemental complaint praying, *inter alia*, that this court exercise the jurisdiction retained by it in section V above recited and in order to give full effect to said decree that this court enter judgment:

"3. Directing Columbia Gas to divest itself of all control, direct or indirect, legal or practical, of Panhandle Eastern, * * *.

"(a) Directing Columbia Oil to proceed straightway to formulate and submit to this court for approval, * * * a

[1] In the interest of brevity, Columbia Gas & Electric Corporation will be referred to in this opinion as "Columbia Gas", Columbia Oil & Gasoline Corporation as "Columbia Oil", Panhandle Eastern Pipe Line Company as "Panhandle Eastern" and Missouri-Kansas Pipe Line Company as "Mokan".

plan for the sale or other disposition by it of all interest which it may have in any stock of Panhandle Eastern;

"(b) Directing Columbia Gas to proceed straightway to formulate and submit to this court for approval, as an alternative to any plan submitted by Columbia Oil pursuant to paragraph (a), * * * a plan for the sale or other disposition by it of all interest which it may have in any securities having present or potential voting rights in Columbia Oil.

"4. Reconstituting the voting trust established pursuant to said decree of January 29, 1936, so as:

"(a) To make the voting trustee a trustee for sale, * * *" for a limited term and with powers and duties appropriately defined.

The time for answer was extended by stipulation and the answer has not been filed to the Government's supplemental complaint.

February 6, 1939 Mokan filed its motion for leave to intervene in this suit and to file the petition annexed to its motion. The prayers of this petition are:

"1. That the defendants be adjudged guilty of contempt for failure to comply with and for having violated the terms, conditions and provisions of the Decree of this Court entered herein on January 29, 1936.

"2. That said Decree be interpreted, enlarged and enforced as follows:

"(a) That it be decreed that Columbia Gas holds as trustee for Panhandle Eastern its pipe line from Dana to Zionsville, Indiana, and from Zionsville to Detroit, Michigan, and that Columbia Gas be ordered and directed forthwith to transfer said line to Panhandle Eastern upon such terms and conditions for the security of its investment therein as this Court may deem just and to account to Panhandle Eastern for the issues and profits thereof.

"(b) That Columbia Gas be ordered and directed forthwith to cause Michigan Gas Transmission Corporation to transfer to Panhandle Eastern any and all contracts or agreements for the supply of gas entered into with any municipalities, persons, firms or corporations in the States of Indiana, Michigan and Ohio, since the entry of the said Decree.

"(c) That Columbia Oil be ordered forthwith to surrender to Panhandle Eastern at cost for cancellation its Class B preferred stock of Panhandle Eastern and 80,000 shares of the common stock of Panhandle Eastern.

"(d) That Columbia Oil be ordered forthwith to sell its remaining stock of Panhandle Eastern to a purchaser or purchasers and upon terms to be approved by this Court.

"(e) That the exceptions set forth in Article II of the decree be stricken out.

"3. That Gano Dunn be removed as Trustee, and that a new Trustee be appointed pending divestiture by Columbia Oil of its Panhandle Eastern securities.

"4. That such other or further relief may be granted as to the Court may seem just and equitable."

In prayer 1 Mokan seeks to raise a question of contempt by defendants in respect to alleged violations of the consent decree of January 29, 1936. By subdivisions (a) and (b) of prayer 2 Mokan seeks to raise a complicated question of property in a transmission line owned by Michigan Gas Transmission Corporation, a subsidiary of Columbia Gas, and extending from the terminus of Panhandle Eastern at Dana, Indiana, to Detroit, Michigan. By subdivision (c) of prayer 2 Mokan seeks to procure the retirement of 80,000 shares of common stock of Panhandle Eastern now held by Columbia Oil. By prayer 3 Mokan seeks to have the past conduct of the trustee appointed under the consent decree of January 29, 1936 inquired into in order that he may be removed for alleged violations of his trust. The statement of these prayers indicates how far they depart from the

scope of the supplemental complaint and how serious a delay would be involved in the determination of the questions raised thereby.

Intervention of Right.

Intervention of right is governed by subdivision (a) of Rule 24 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

Courts are unanimous in requiring prompt action on the part of an intervenor who seeks to assert rights in a suit to which he is not a party. The new rule above quoted requires that application for intervention be timely. It begins with the words "Upon timely application * * *." The matters of which petitioner complains,—the acquisition by Columbia Gas of ownership of the Detroit extension, the acquisition by Columbia Oil of class B preferred stock of Panhandle Eastern, the acquisition by Columbia Oil of common stock of Panhandle Eastern in connection with the Detroit financing, and the March 17, 1936 contract,—all took place before June 1, 1936. Columbia Gas and Columbia Oil have spent many millions of dollars carrying out the transactions. Petitioner had full notice and knowledge of all these arrangements prior to their consummation. These details were set out in the offer of settlement made by Columbia Oil and Columbia Gas to Mokan and were accepted by Mokan after full hearing thereon in the Court of Chancery of the State of Delaware. Obviously Mokan's application is not a timely one.

Clause (1) of subdivision (a) of Rule 24 is plainly inapplicable.

Clause (2) of subdivision (a) relates to cases in which the applicant for intervention has an interest in the action represented by a party so that the applicant may be bound by a judgment in the action. The question of adequacy of representation does not arise unless the applicant is represented in the action. Neither Mokan, as a substantial stockholder of Panhandle Eastern, nor Panhandle Eastern, is represented by the United States. The interest of either of them will not be bound by a judgment on the supplemental complaint. The judgment of this court upon the issues tendered in the supplemental complaint will not bind Mokan or Panhandle Eastern. Such a judgment can not bind them with respect to the wholly different issues tended by Mokan's proposed petition of intervention. Petitioner has no right to encumber the main action which is being conducted by the Attorney General with extraneous issues of a private nature. *United States* v. *Radio Corporation*, D. C., 3 F. Supp. 23, 25. *United States* v. *Northern Securities Co.*, C. C., 128 F. 808, 813.

Clause 3 of subdivision (a) relates to cases in which the applicant will be adversely affected by a disposition of property in the custody of the court in which the applicant asserts an interest. This property consists of stock in Panhandle Eastern beneficially owned by Columbia Oil, and transferred to the voting trustee. In that stock neither Mokan nor Panhandle has any property right. Any disposition of that stock which would terminate control of Columbia Oil over Panhandle Eastern could not be regarded as adverse to either Panhandle Eastern or Mokan. On the contrary, Mokan seeks such disposition. Early in the English law a third person claiming an interest in property under the control of the court was permitted by interrogatories to establish his claim to or lien upon such property. This principle found expression in old Equity Rule 37, 28 U. S. C. A. following section 723. The new rule does not specifically set forth the nature of the interest in the property which a person must have in order to establish his

claim to intervention as a matter of right. It is improbable that the Supreme Court in promulgating this new rule intended to destroy well established principles as the basis of intervention as of right. It would produce chaos to require the courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action.

Clause 3 contemplates that the person having the right of intervention should have a legal interest in the property in the custody of the court. The *res* in this case is the Panhandle Eastern stock in the possession of Dunn. That stock is not being administered by the court. Dunn is not an administrative officer of the court. His duties as trustee merely contemplate the holding of Panhandle Eastern stock owned by Columbia Oil for the purpose of seeing that the provisions of the consent decree are carried out and that the affairs of Panhandle Eastern are free from the control and domination of Columbia Gas. Dunn is obliged to turn over to Columbia Oil all dividends except certain stock dividends. He must vote the stock in the manner directed by Columbia Oil. He is a mere watchman to see that the provisions of the consent decree are carried out. The stock of Panhandle Eastern is not "in the custody of the court or of an officer thereof" within the meaning of Rule 24(a).

Petitioner's final contention is that Rule 24(a) has broadened the well established principle to the extent of no longer requiring "any actual property interest in the *res*". This position is without authority to sustain it.

Permissive Intervention.

Permissive intervention is governed by subdivision (b) of Rule 24 of Rules of Civil Procedure, 28 U. S. C. A. following section 723c:

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or

defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties".

Clause (1) has no application. Clause (2). The prayers of the proposed petition of intervention diverge sharply from the subject matter of the supplemental complaint. Affording petitioner relief would fundamentally alter and seriously complicate the character of this proceeding. The bare statement of the prayers sufficiently indicates how far they depart from the scope of the Government's complaint and how serious a delay would be involved in the determination of the questions raised thereby. The situation thus falls squarely within the last sentence of subdivision (b) which codifies prior equity practice.

"The intervener was not entitled to come into the suit for the purpose of having adjudicated a controversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not by the intervener be so enlarged. It is limited to the field of litigation open to the original parties. * * * Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill." *Chandler & Price Co.* v. *Brandtjen & Kluge*, 296 U. S. 53, 57, 59, 56 S. Ct. 6, 8, 80 L. Ed. 39.

"It is apparent that, the right to become a party to the litigation being given, the range of activity of the newcomer in the prosecution or defense of the interest he is thus permitted to assert must necessarily be as extensive as, but no greater than, that allowed the original parties to the suit." *Leaver* v. *K. & L. Box & Lumber Co.*, D. C. 6 F. 2d 666, 667.

ANTI-TRUST SUIT.

An individual may not participate in a suit brought under the Anti-Trust laws by the Attorney General of the United States where the Attorney General does not consent to such intervention. In the present case the Attorney

General affirmatively objects to the intervention. In its brief the government states that the United States opposes the motion of Mokan for leave to intervene "because (1) Mokan is not entitled to intervention of right, and (2) intervention by Mokan for the purposes set forth in its proposed petition would unduly complicate and delay the adjudication of the issues tendered by plaintiff's supplemental complaint." When the Anti-Trust laws are violated frequently there are private persons or corporations who feel themselves aggrieved.

Outside this suit Mokan can assert any claim for damages it may have against the defendants or for relief against Dunn for his alleged breaches of trust. Such a right has been recognized by this court.

"However, the petitioner and other stockholders of Radio Corporation should not be deprived of their 'day in court.' The petitioner or any stockholder of Radio Corporation believing himself aggrieved by the action of General Electric or Westinghouse under or pursuant to the provisions of the consent decree may file a bill in this court seeking appropriate relief." *United States* v. *Radio Corporation*, D. C., 3 F. Supp. 23, 26.

Mokan's motion for leave to intervene must be denied.

Appendix B.

Reported in 108 Federal Reporter (2nd) 614.

MISSOURI-KANSAS PIPE LINE CO. *v.* UNITED STATES *et al.*

Nos. 7177, 7183.

CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

December 15, 1939.

Appeal from the District Court of the United States for the District of Delaware; John P. Nields, Judge.

Suit by the United States of America against the Columbia Gas & Electric Corporation and others to restrain an alleged monopoly. From orders denying petitions of the Missouri-Kansas Pipe Line Company for leave to intervene, 27 F. Supp. 116, 28 F. Supp. 168, the petitioner appeals.

Appeals dismissed.

Martin G. Hannigan, of Wilmington, Del. (Kenneth E. Walser, of New York City, of counsel), for appellant.

Cravath, de Gersdorff, Swaine & Wood, of New York City, Ward & Gray, of Wilmington, Del. (Clarence A. Southerland, of Wilmington, Del., and Douglas M. Moffat, of New York City, of counsel), for defendants-appellees Columbia Gas & Electric Corporation, George H. Howard, Philip G. Gossler, Thomas R. Weymouth, Thomas B. Gregory and Edward Reynolds, Jr.

Daniel O. Hastings, of Wilmington, Del., and William H. Button and Auchincloss, Alley & Duncan, all of New York City (William H. Button and James B. Alley, both of New York City, of counsel), for defendant-appellee Columbia Oil & Gasoline Corporation.

Thomas J. Lynch, of Washington, D. C., Wm. L. McGovern, Sp. Assts. to Atty. Gen., and Thurman Arnold, Asst. Atty. Gen., for appellee United States.

Before MARIS, CLARK, and BIDDLE, Circuit Judges.

BIDDLE, Circuit Judge.

These are consolidated appeals from orders of the United States District Court for the District of Delaware, entered March 30, 1939 and July 10, 1939, respectively, 27 F. Supp. 116, 28 F. Supp. 168, denying petitions of Missouri-Kansas Pipe Line Company, the appellant, for leave to intervene. The suit was brought by the United States under the anti-trust laws[1] against Columbia Gas & Electric Corporation, Columbia Oil & Gasoline Corporation, and certain individuals, to restrain an alleged monopoly by divesting the Columbia Companies of their control over Panhandle Eastern Pipe Line Company, which had been organized as a wholly owned subsidiary of the appellant. A consent decree was entered on January 29, 1936, under which voting stock of Panhandle, owned by Columbia Oil, was transferred to a trustee. On January 12, 1939, the Government filed a supplemental complaint to effect a complete divestiture of the stock. On February 6, 1939 appellant filed a motion for leave to intervene, alleging that its principal asset was a block of Panhandle stock, and seeking intervention as a matter of right, under Rule 24 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, on the ground that it would be adversely affected by any disposition of the Panhandle stock which had been trusteed and which it claimed was "property in the custody of the court or of an officer thereof."[2] On March 30, 1939, the court entered an order denying intervention. On May 15, 1939, the Government moved for a vacation of the consent decree, and filed an amended complaint; and on June 20, 1939, the defendants moved for a modification of the consent decree and submitted a proposed plan to accomplish the divestiture. On July 5th, appellant again sought intervention which was refused on July 10th.

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[1] Act of July 2, 1890, c. 647; Act of Oct. 15, 1914, c. 323, 15 U. S. C. A., §1 *et seq.*

[2] "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

(1) It is unnecessary to consider whether the appellant had an absolute right of intervention under the Rule, or whether the order denying leave to intervene was interlocutory or final, since we are of the opinion that this court is without jurisdiction to consider the appeal.

The question is specifically ruled by *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 558, 559, 49 S. Ct. 423, 425, 73 L. Ed. 838. In that case a consent decree had been entered against certain meat packers. Two years later the co-operative filed a petition to intervene. The Supreme Court of the District of Columbia denied intervention. The Court of Appeals reversed and directed that appellant be allowed to intervene. *California Co-op. Canneries* v. *United States,* 55 App. D. C. 36, 299 F. 908. The Supreme Court reversed the judgment of the Court of Appeals and held that appeals under the Expediting Act[3] must be taken directly from the District Court to the Supreme Court. "Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller,* 252 U. S. 364, 40 S. Ct. 347, 64 L. Ed. 616; and it precluded the possibility of an appeal to either court from an interlocutory decree. * * * The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene."

That the Expediting Act is only to facilitate enforcement of the final decree and that here there is no final decree, is urged by appellant, but not sustained by the Supreme Court's construction of the Act. And, whether or not these two orders are interlocutory or final, it is per-

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[3] Act of Feb. 11, 1903, §2, 15 U. S. C. A., §29. "*Appeals to Supreme Court.* In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, and appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

fectly clear from that decision that we have no jurisdiction to hear the appeals.

The appeals are therefore dismissed.

(2, 3) The transcript of record in this case consists of 1486 pages, of which 361 only were printed under appellant's praecipe, and the balance under the praecipe of the two corporate appellees. We think that the narrow questions presented to us do not warrant the printing of such an elaborate record, in no sense justified by the appeal. Appellant should not be called upon to pay these unnecessary costs; and we accordingly direct that three-fourths of the costs of printing the record be taxed against Columbia Gas & Electric Corporation and Columbia Oil & Gasoline Corporation jointly; and the balance of the costs on appeal against appellants.[4]

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[4] Although rule 29 of our Court, dealing with the costs, does not apply to cases where the appeal is dismissed for want of jurisdiction, this Court has undoubtedly power in equity cases to allow costs in its discretion. *H. H. Robertson Co.* v. *Klauer Mfg. Co.*, 8 Cir., 98 F. 2d 150. Courts have exercised this discretion in not permitting costs of printing part of the record not necessary to the determination of the relevant issues. *Syracuse Engineering Co.* v. *Haight*, 2 Cir., 97 F. 2d 573, 574; *Kynerd* v. *Hulen*, 5 Cir., 5 F. 2d 160; *Amerlux Steel Corp* v. *Johnson Line*, 9 Cir., 33 F. 2d 70; *Davis* v. *Carrier*, Cust. & Pat. App., 81 F. 2d 250; *Lincoln Motor Co.* v. *Lincoln Mfg. Co.*, 58 App. D. C. 191, 26 F. 2d 563.

Appendix C.

Reported in 32 Federal Supplement, 474.

UNITED STATES *v.* COLUMBIA GAS ELECTRIC CORPORATION, *et al.*,

No. 1099.

DISTRICT COURT, D. DELAWARE.

April 6, 1940.

In Equity. Anti-trust suit by the United States of America against the Columbia Gas & Electric Corporation and others, wherein a consent decree was entered. On motion to dismiss application by the Panhandle Eastern Pipe Line Company to become a party for a limited purpose.

Motion granted.

Robert J. Bulkley, of Cleveland, Ohio, Russell Hardy, of Washington, D. C., and Arthur G. Logan (of Logan & Duffy), of Wilmington, Del., for petitioner.

William H. Button and James B. Alley (of Auchincloss, Alley & Duncan), both of New York City, and Daniel O. Hastings (of Hastings, Stockly & Layton), of Wilmington, Del., for Columbia Oil & Gasoline Corporation.

Douglas M. Moffat (of Cravath, de Gersdorff, Swaine & Wood), of New York City, and Clarence A. Southerland (of Southerland, Berl, Potter & Leahy), of Wilmington, Del., for Columbia Gas & Electric Corporation.

Thomas J. Lynch, Sp. Asst. to Atty. Gen. and Stewart Lynch, U. S. Atty., of Wilmington, Del., for the United States.

Edward N. Goodwin, of New York City, and Hugh M. Morris and Edwin D. Steel, Jr., both of Wilmington, Del., for Panhandle Eastern Pipe Line Co.

NIELDS, District Judge.

Motion to dismiss application to become a party for a limited purpose.

In the anti-trust suit of United States *v.* Columbia Gas & Electric Corporation, Columbia Oil & Gasoline Corporation, and others, a consent decree was entered by this Court January 29, 1936. The closing paragraph of the decree provides: "* * * that Panhandle Eastern (Panhandle Eastern Pipe Line Company) upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof".

The sole question raised by the motion to dismiss is whether Panhandle Eastern has made a "proper application" to become a party to this suit. March 23, 1940, a document in the form of an unverified application to become a party was filed. This document is signed "Panhandle Eastern Pipe Line Company by Arthur G. Logan." Immediately below this signature appear "Arthur G. Logan, Logan & Duffy, Attorneys for Petitioner, 303 Delaware Trust Building, Wilmington, Delaware". Below and to the left of these signatures the following names of counsel are typed: "Russell Hardy", "Robert J. Bulkley", "Arthur G. Logan".

The propriety of the application to become a party turns upon the terms of the consent decree. By Section III of that decree Gano Dunn was appointed Trustee for the purposes and with the powers and duties set forth in that section. The decree further provides:

"That within 10 days after the entry of this decree Columbia Oil shall transfer all of its stock now owned and thereafter all stock subsequently acquired in Panhandle Eastern, having present or potential voting rights, to said trustee to hold the legal title to said stock and to exercise all the rights and privileges incidental to the absolute ownership thereof upon the following terms and conditions:

"(a) To vote said stock for the election of as many directors of Panhandle Eastern as the number of shares thereof may be entitled to elect; Provided, that one of the directors so elected shall be the trustee; and that the remainder shall be selected from among persons recommended by the beneficial owner of said stock, in conference

and with the advice of the trustee, and that, as to the directors so selected, the trustee is empowered to remove and replace such directors with others of his own choosing upon his own motion, if in his judgment such action is necessary in the interest of Panhandle Eastern or for the effectuation of the purposes of this decree; subject, however, in this as well as in the exercise of all her powers to the authority of this Court upon the motion and showing of any party hereto, or upon its own motion, to restrain said trustee from abuses of sound discretion, in view of the purposes of this decree and the law under which it is entered, or in case said trustee does not act in good faith hereunder;

"(b) To vote said stock upon all other questions and matters in which the stock is entitled to vote, as directed by the beneficial owners thereof, except when such directions are inconsistent with the purposes of this decree."

The business of a corporation is conducted by its board of directors and officers. The control of Panhandle Eastern was vested in the Trustee. He was one of the directors. He shares with Columbia Oil in the selection of the others. He was empowered to remove any of the other directors and replace such directors by others of his own choosing upon his own motion. As the board of directors chose the officers, the Trustee was the final word in the conduct of the business of Panhandle Eastern. This control should be borne in mind in construing paragraph (b) of the decree.

The selection of Gano Dunn as Trustee was made by the Attorney General of the United States as the person best qualified to serve in a very difficult and exacting position from a group of names submitted to him.

Notice of the regular annual stockholders' meeting of Panhandle Eastern to be held March 11, 1940 was duly sent to stockholders. It notified them that the proposed business to be considered at the meeting would be the election of directors for the ensuing year, an amendment of the certificate of incorporation, and such other business as might properly come before the meeting.

Mindful of paragraph (b) of Section III of the decree, Gano Dunn obtained from the executive head of Columbia Oil, the beneficial owner of the stock of Panhandle Eastern held by him, directions as to voting said stock at the annual meeting. March 5, 1940, Don M. Wilson, a vice president of Columbia Oil and acting president, directed Gano Dunn to vote the shares of stock held by him in favor of the amendment to the articles of incorporation proposed by the Board, and as to other matters, excepting the election of directors, to vote said shares "as, in his discretion, seemed best for the interest of Panhandle Eastern Pipe Line Company and generally to support the management; that, in case any matters were presented at the meeting on which he had any doubt as to how to vote, he could adjourn the meeting for a sufficient time to confer by telephone with the representatives of Columbia Oil & Gasoline Corporation". March 8, 1940, the board of directors of Columbia Oil adopted a resolution expressly approving said directions and also approving a letter from Wilson to Dunn containing the following directions:

"Dear Mr. Dunn:

After consultation with you, as Trustee holding the voting stock in Panhandle Eastern Pipe Line Company, which is owned by this Corporation, and with your advice, we recommend the following individuals for your selection as Directors of Panhandle Eastern Pipe Line Company, and request that you elect them as such by vote of the stock which you hold as Trustee:

Joseph A. Bower,
165 Broadway, New York City

Joe D. Creveling,
90 Broad Street, New York City

Gano Dunn,
80 Broad Street, New York City

Walter G. Mortland,
37 East 64th Street, New York City

Richard C. Patterson, Jr.,
1270 Sixth Avenue, New York City.

Robert C. Winmill,
1 Wall Street, New York City

Very truly yours,

(signed) D. M. Wilson,
Vice President."

Before determining upon the six directors named in the above letter, Columbia Oil in conference with Dunn recommended certain persons as directors and from among the number so recommended Dunn selected the six above named as the six of the nine directors of Panhandle Eastern which the stock beneficially owned by Columbia Oil was entitled to elect.

From the foregoing, it appears that Gano Dunn attended the annual meeting of March 11 girded with his own authority as Trustee, supplemented by all the directions from Columbia Oil that could have been anticipated in the normal course of human events.

March 11, 1940, at the opening of the annual stockholders' meeting, Creveling, President of Panhandle Eastern, took the Chair and called the meeting to order as provided in the by-laws. The Chairman announced the presence of a quorum. Thereupon, Logan, who appeared as a stockholder, moved that Dixon, as associate of Maguire, be made Chairman of the meeting "from this time forward". Creveling declared the motion out of order. Thereupon, Logan took an appeal from the ruling of the Chairman. A vote was taken. Gano Dunn voted to uphold the Chair while Logan and his associates voted the contrary. Creveling announced that his ruling had been upheld.

Shortly thereafter, Logan moved that Article II of the by-laws be amended to read: "The property and business of this corporation shall be managed by its board of directors, consisting of 14 persons."

This drastic action of increasing the number of directors from 9 to 14 was proposed without notice thereof, and evidently with the intent to acquire control of a large and valuable property. The Chairman declared the motion out of order in view of Article 42 of the by-laws, providing that the by-laws may be altered or amended "if notice of the proposed alteration or amendment be contained in the notice of the meeting". An appeal was taken with the same result as in preceding instances.

Motions were made that the Class B stock be not allowed to vote; that officers of the company be chosen by the stockholders; that their salaries be fixed by the stockholders; that Maguire be made president and Tringham treasurer of the company. These motions were disposed of as the others had been. In each instance Dunn voted the majority of the voting stock against the motions, and Logan and his associates voted for the motions.

Hand moved that Panhandle Eastern become a party to the suit of Missouri-Kansas Pipe Line Company and Dammann against the Columbia companies. This motion was similarly disposed of. Hand further moved that the Class A stock of Panhandle Eastern be redeemed. This motion met the same fate.

The following motion concisely states the position of Logan and his associates throughout the meeting: "Mr. President, I now move that this corporation refuse to accept any vote of Mr. Gano Dunn on any question unless he first establishes by competent proof that he has been directed by Columbia Oil and Gasoline Corporation to cast his vote in accordance with the way he may cast it due to the fact that this corporation is aware of the limitation upon his powers."

Later, Hand moved that Panhandle Eastern be directed to bring six suits as suggested in a letter of January 15, 1940 from Missouri-Kansas Pipe Line Company to Panhandle Eastern. The fourth item of this letter was an instruction that Panhandle Eastern intervene in this antitrust suit by the United States pending in this court. At this meeting a resolution was offered by Hand that Panhandle Eastern be directed to make the present application.

Gano Dunn, holding a majority of the voting stock of Panhandle Eastern, voted against the resolution and it was accordingly defeated.

It was further moved: "That this corporation will employ Robert J. Bulkley of Cleveland, Ohio, Russell Hardy of Washington, D. C. and Arthur Logan of Wilmington, Delaware, as its attorneys to take action provided for herein," and further, "that the officers of this corporation arrange and pay a reasonable compensation to said attorneys for such services."

Thereafter, the meeting adjourned, although as to adjournment Logan objected that Gano Dunn was not qualified to vote without producing before the meeting specific instructions from Columbia Oil.

After adjournment Logan and his associates held a meeting of their own. No quorum was present. Holders of a minority of the stock of Panhandle Eastern, either in person or by proxy, were the only persons present. The motions of Logan and of his associates, defeated at the regular meeting, were resubmitted at the subsequent meeting, and purported to be passed.

March 20, 1940, a special meeting of the Board of Directors of Columbia Oil was held. The Chairman stated that he had received an official stenographic transcript of the proceedings of the annual meeting of stockholders of Panhandle Eastern of March 11, 1940. Upon consideration of those minutes and of the manner which Gano Dunn, Trustee, had voted the stock in Panhandle Eastern, it was resolved: "That all of the votes and all of the positions taken by said Gano Dunn as Trustee or otherwise at said stockholders' meeting be and the same hereby are in all respects approved, ratified and confirmed".

In construing the language of the consent decree, I find that the votes cast by Gano Dunn were authorized by the powers conferred upon him by the consent decree and that his votes were well within the directions given to him by Columbia Oil. From this finding, it follows that the so-called application filed in this proceeding was not author-

ized by Panhandle Eastern or by any responsible body having control of said corporation.

The motion to dismiss the alleged application of Panhandle Eastern for leave to become a party hereto and for other relief must be granted for the following reasons:

1. Said application was not authorized by Panhandle Eastern.

2. The attorneys whose names appear on said application as attorneys for Panhandle Eastern were not authorized by that company to act in its behalf in filing such application.

3. Gano Dunn, Trustee, duly voted the shares of stock of Panhandle Eastern on all matters on which he voted at the annual meeting of March 11, 1940, in accordance with provisions of said consent decree, and pursuant to valid directions from Columbia Oil.

An order may be submitted.

Appendix D.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, GEORGE H. HOWARD, PHILIP G. GOSSLER, CHARLES A. MUNROE, THOMAS R. WEYMOUTH, THOMAS B. GREGORY, EDWARD REYNOLDS, JR., BURT R. BAY and JOHN H. HILLMAN, JR.,
Defendants-Respondents,
Appellees.

Stipulation.

WHEREAS, an application was made in the Court below allegedly on behalf of Panhandle Eastern Pipe Line Company for leave, pursuant to the provisions of Section V of the Decree entered by the Court below on January 29, 1936, to become a party to said cause for the limited purpose of enforcing the rights conferred by Section IV of said Decree, and

WHEREAS, Columbia Gas & Electric Corporation and Columbia Oil & Gasoline Corporation moved to dismiss said alleged application on the ground, among others, that the attorneys whose names appeared thereon as attorneys

for Panhandle Eastern Pipe Line Company were not authorized by that company to act in its behalf in bringing or prosecuting such application, and

WHEREAS, said motion came on to be heard on April 1, 1940, before the United States District Court in the District of Delaware, and on April 23, 1940 an order was entered granting said motion and denying the said alleged application; and

WHEREAS, an appeal from said order was taken to the Supreme Court of the United States on June 14, 1940, which appeal was allowed by said District Court on said date and said appeal is now before said Supreme Court for consideration on appellant's Jurisdictional Statement; and

WHEREAS, a notice of appeal was filed allegedly on behalf of Panhandle Eastern Pipe Line Company to the United States Circuit Court of Appeals for the Third Circuit from said order in order to preserve its alleged rights in the event that the Supreme Court of the United States determines that it does not have jurisdiction on said appeal; and

WHEREAS, the time to file the record on appeal in said Circuit Court of Appeals of the United States may expire prior to the time that the Supreme Court acts upon the question of jurisdiction, unless such time be extended by stipulation of the parties; and

WHEREAS, the appellees, at the request of appellant are willing that such time be extended so as to avoid a duplication of printing and other costs relating to said appeals:

NOW, THEREFORE, IT IS HEREBY STIPULATED AS FOLLOWS:

1. That if the Supreme Court of the United States accepts jurisdiction on the basis of appellant's Jurisdictional Statement on the appeal which was allowed on June 14, 1940, then the appeal to the Circuit Court of Appeals shall be withdrawn and all action necessary to discontinue the same shall be taken.

2. That if the Supreme Court of the United States refuses to entertain jurisdiction on said appeal on the basis of appellant's Jurisdictional Statement, then the time of appellant to file the record on appeal and formally docket the appeal in the Circuit Court of Appeals of the United States for the Third Circuit is hereby extended to and including ten days after the Supreme Court refuses to entertain jurisdiction.

3. That this stipulation shall not be construed as a waiver by any of the appellees herein of their right to assert that the Supreme Court of the United States has no jurisdiction on the appeal taken to that Court or that the Circuit Court of Appeals for the Third Circuit has no jurisdiction on the appeal taken to that Court, irrespective of whether or not the Supreme Court of the United States decides to entertain jurisdiction on th appeal to that Court on the basis of appellant's Jurisdictional Statement.

STEWART LYNCH,
Attorney for United States of America.

C. A. SOUTHERLAND,
Attorney for Columbia Gas & Electric Corporation, George H. Howard, Philip G. Gossler, Thomas R. Weymouth, Thomas B. Gregory, Edward Reynolds, Jr. and Burt R. Bay.

HASTINGS, STOCKLY & LAYTON,
By C. R. LAYTON, 3RD,
OK Attorney for Columbia Oil & Gasoline
JBA Corporation and Charles A. Munroe.

CALEB S. LAYTON,
Attorney for John H. Hillman, Jr.

ARTHUR G. LOGAN,
Attorney for Panhandle Eastern Pipe Line Company.

Dated: October 16, 1940.

Appendix £.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

MISSOURI-KANSAS PIPE LINE COMPANY,
Petitioner-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, GEORGE H. HOWARD, PHILIP G. GOSSLER, CHARLES A. MUNROE, THOMAS R. WEYMOUTH, THOMAS B. GREGORY, EDWARD REYNOLDS, JR., BURT R. BAY and JOHN H. HILLMAN, JR.,
Defendants-Respondents,
Appellees.

Stipulation.

WHEREAS, MISSOURI-KANSAS PIPE LINE COMPANY made an application in the Court below as a stockholder on behalf of Panhandle Eastern Pipe Line Company purportedly acting in accordance with the terms of Section V of a Decree entered by the Court below on January 29, 1936, to become a party to said cause for the limited purpose of enforcing the rights conferred upon Panhandle Eastern Pipe Line Company by Section IV of said Decree, and

WHEREAS, said application came on to be heard on April 23, 1940, before the United States District Court in the District of Delaware, on which date an order was entered denying the said application; and

WHEREAS, an appeal from said order was taken to the Supreme Court of the United States on June 14, 1940, which appeal was allowed by said District Court on said date and said appeal is now before said Supreme Court for consideration on appellant's Jurisdictional Statement; and

WHEREAS, Missouri-Kansas Pipe Line Company filed a notice of appeal to the United States Circuit Court of Appeals for the Third Circuit from said order in order to preserve its alleged rights in the event that the Supreme Court of the United States determines that it does not have jurisdiction on said appeal; and

WHEREAS, the time to file the record on appeal in said Circuit Court of Appeals of the United States may expire prior to the time that the Supreme Court acts upon the question of jurisdiction, unless such time be extended by stipulation of the parties; and

WHEREAS, the appellees, at the request of appellant are willing that such time be extended so as to avoid a duplication of printing and other costs relating to said appeals;

NOW, THEREFORE, IT IS HEREBY STIPULATED AS FOLLOWS:

1. That if the Supreme Court of the United States accepts jurisdiction on the basis of appellant's Jurisdictional Statement on the appeal which was allowed on June 14, 1940, then Missouri-Kansas Pipe Line Company shall withdraw the appeal to the Circuit Court of Appeals and take all action necessary to discontinue the same.

2. That if the Supreme Court of the United States refuses to entertain jurisdiction on said appeal on the basis of appellant's Jurisdictional Statement, then the time of Missouri-Kansas Pipe Line Company to file the record

on appeal and formally docket the appeal in the Circuit Court of Appeals of the United States for the Third Circuit is hereby extended to and including ten days after the Supreme Court refuses to entertain jurisdiction.

3. That this stipulation shall not be construed as a waiver by any of the appellees herein of their right to assert that the Supreme Court of the United States has no jurisdiction on the appeal taken to that Court or that the Circuit Court of Appeals for the Third Circuit has no jurisdiction on the appeal taken to that Court, irrespective of whether or not the Supreme Court of the United States decides to entertain jurisdiction on the appeal to that Court on the basis of appellant's Jurisdictional Statement.

STEWART LYNCH,
Attorney for the United States of America.

C. A. SOUTHERLAND,
Attorney for Columbia Gas & Electric Corporation, George H. Howard, Philip G. Gossler, Thomas R. Weymouth, Thomas B. Gregory, Edward Reynolds, Jr. and Burt R. Bay.

HASTINGS, STOCKLY & LAYTON,
By C. R. LAYTON, 3RD,
OK JBA
Attorney for Columbia Oil & Gasoline Corporation and Charles A. Munroe.

CALEB S. LAYTON,
Attorney for John H. Hillman, Jr.

ARTHUR G. LOGAN,
Attorney for Missouri-Kansas Pipe Line Company.

Dated: October 16, 1940.

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